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Constitutional politics : interpretive activity in America.

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CONSTITUTIONAL POLITICS:
INTERPRETIVE ACTIVITY IN AMERICA

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DEDICATION

With deepest appreciation for his
interest, commitment, teaching, and friendship
this dissertation is dedicated to

John Brigham

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It is a rare and welcome opportunity to publicly thank those who have influenced my work and life in important, if diverse, ways. The pleasure of scanning the memory of my graduate experience to recall those who touched me most encourages me beyond brevity. Among my fellows at the University of Massachusetts, Kathleen Moore and Steve Peletiere were two particularly strong intellectual and moral supporters whose friendship eased the path to this end. In forming my committee, I have been most fortunate -- three highly regarded and productive scholars. Sheldon Goldman readily agreed to serve on my committee and to "help in any way I can." This included a valuable recommendation for a teaching job at the University of Connecticut as I worked on this dissertation. Julie Graham's agreement to serve on the committee was a generous gift of time. Both Shelly and Julie gave me important feedback that tightened and stimulated my thinking. The chairman of my committee, John Brigham, took me through the academy and into the profession. For this and more, I dedicated this dissertation to him. Two other fine professors who also stand out are Gerard Braunthal and Dean Alfange. Dean taught me. The subject was constitutional law but I have always felt I came away with a mind changed by more than an infusion of that topic. Dean has also generously remained a valuable reviewer of my work. That has been worth "diamonds and emeralds" to me. Beyond the gifts of his intellect, Gerry Braunthal offered his friendship and respect

taking me on as a colleague when I was his teaching assistant - important lessons were learned there. To all these people as well as dear friends and family in Connecticut whose generosity of time and interest helped produce this work, I am deeply grateful. Much as these people have contributed, however, this work is my own and I take full responsibility for that.

I feel a different, deeper gratitude to my two daughters and husband. Rosalie and Phyllis gave me time out of their childhood so that I could do the work that I valued and they respected. Most lovingly, they willingly parted with the friends and familiarity of Connecticut to move with me for my first job. My husband, Robert, supported me emotionally as well as financially ending his career so that I could begin mine. It is with these three that I am especially blessed. I am also specially blessed with having Rosalie McCoy Farley for my mother. She instilled in me a love of the written word, a respect for intellectual integrity, and a sense of obligation to the world. She is, indeed, the reason I am here.

ABSTRACT

CONSTITUTIONAL POLITICS:
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This dissertation calls on the public law field to expand its focus beyond courts, especially the Supreme Court, to take account of constitutional interpretative activity taking place elsewhere. The field's narrow focus on courts leads us astray in our attempts to explain American constitutionalism fully. The talk on the Constitution taking place in the academy, the Congress, the community, and state legislative forums is part of the activity which has mistakenly be ignored as interpretive practice by the public law field.

This work restructures the framework of analysis to explain the larger picture of American constitutional politics. I do four case studies of this politics using textual qualitative analysis of conference papers, legal briefs, proselytizing tracts, and legislative testimony to look at an academic conference, community struggles against corporate

disinvest, Congress's interpretive practice, and a state legislature's vote against calling for a constitutional convention.

The first study is of a conference held in celebration of the Bicentennial of the Constitution. This conference expands sources for constitutional meaning as it recalls 19th century Reconstruction era constitutional debates. The second study is of movement activity to establish a constitutional property right to stem the tide of corporate disinvestment. Workers and communities have constructed a constitutional claim that they have a right to save jobs. Congress' institution of its own law offices to join the Supreme Court in constitutional debate is the subject of the third study. With the formation of its own law offices, Congress has established control over its constitutional arguments before the Court. Finally, I look at testimony taken by the Connecticut General Assembly on the call for a second constitutional convention. This testimony reveals a quasi-religious attachment of Americans to their document. Rather than representing a deep commitment to democracy, however, it appears to represent an impediment to it.

All of this activity is part of American constitutional interpretive activity but traditionally has not been understood as such. In giving new definition to this activity, I expand the framework of analysis of constitutional interpretive activity and our understanding of it.

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CHAPTER 1.

INTRODUCTION

More than two decades ago, Judith Shklar described the ideological implications of the legal frame for perceptions of rights and constitutionalism.[1] Shklar's theory of "legalism" in America explained why our political culture is especially receptive to the talk about the Constitution. Traditionally in America according to Shklar, legal forms have channeled political action as well as legitimated it. The ideology of legalism, according to Shklar, encourages us to think of law as out "there" and separate from politics. Shklar suggested new ways to think about law; to regard it as part of a social continuum. Shklar said that

> At one end of the scale of legalistic values and institutions stand its most highly articulate and refined expressions, the courts of law and the rules they follow; at the other end is the personal morality of all those men and women who think of goodness as obedience to the rules that properly define their duties and rights. Within this scale there is a vast area of social beliefs and institutions, both more and less rigid and explicit, which in varying degrees depend upon the legalistic ethos.[2]

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[1] See Judith Shklar, Legalism (Cambridge: Harvard University Press, 1964).

[2] See Judith Shklar, Legalism, p. 3.

The challenge to integrate law and politics that she laid down was taken up a decade later by Jonathan Casper[3] and Stuart Scheingold.[4] These scholars brought new perspectives to the public law field with their examination of law in American society. They placed legal thinking within the context of politics.

At the beginning of the last decade, in an essay reviewing the state of the research on law and society, Richard Abel[5] declared the original paradigm of liberal legalism exhausted and challenged scholars to construct a new one by challenging the ideology directly in attempting to develop alternatives. In addition to his critique, Abel suggested ways to discover the needed alternatives. Among them was the suggestion that sociolegal scholars should broaden the meaning of justice itself by, "Stepping outside the ideology through which legal institutions seek legitimation and asking what the public views as just and where it perceives significant injustice in the operation of

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[3] See Jonathan D. Casper, The Politics of Civil Rights (New Haven: Yale University Press, 1972).

[4] See Stuart A. Scheingold, The Politics of Rights (New Haven: Yale University Press, 1974).

[5] See Richard L. Abel, "Redirecting Social Studies of Law," Law and Society Review 14 (1980):805.

law."[6] It is somewhat surprising in a democracy that the idea of seeking input from the people on their view of law is offered as a new approach. Nevertheless, it is, but the new approach that Abel called for is not more gap studies that implicitly endorse formal legal institutions' view of the law by checking to see if public knowledge measures up to it.[7]

The gap study perspective continues to bind even those scholars who aim their attention at the people rather than their institutions. Michael Kammen[8] made a study of the cultural impact of the United States Constitution in an attempt to describe the place of the Constitution in the public consciousness and symbolic life of the American people. He said of his study, "...I consider this a study in popular constitutionalism, by which I mean the perceptions and misperceptions, uses and abuses, knowledge and ignorance of ordinary Americans."[9] Kammen notes that in 1920, the Constitution and the Declaration of

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[6] See Richard L. Abel, "Redirecting Social Studies of Law," p. 828-29.

[7] See Austin Sarat, "Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistance of a Research Tradition," Legal Studies Forum 10 (1985):23.

[8] See Michael Kammen, A Machine That Would Go Of Itself (New York: Alfred A. Knopf, 1986).

[9] See Michael Kammen, A Machine That Would Go Of Itself, p. xi.

Independence were taken out of a vault at the State Department to be put on display in order to bolster American morale in resisting bolshevism.[10] (In a war of words, we brought out our biggest guns.) This instrumental use of the Constitution was taken up by the Immigration and Naturalization Service around this same time. The increase in immigration into the United States combined with growing isolationist and xenophobic attitudes encouraged the U.S. government to use knowledge of the Constitution as both a test of understanding of the American system as well as a gate at its shores. Successful immigrants had to prove a "fair" knowledge of the document with the INS deciding what was fair. In order to exclude "undesirable" aliens, trick questions were often asked. For example, which grocery stores are allowed to use false scales? Or, double questions might be used allowing the inspector to accept or reject an answer according to the applicant. Underlying these abuses of constitutionalism, however, was a sense that those living here must be or become "American" and the Constitution was at the heart of Americanism.[11]

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[10] See Michael Kammen, A Machine That Would Go Of Itself, p. 223.

[11] See Michael Kammen, A Machine That Would Go Of Itself, p. 236.

Kammen's meticulous account of the American culture of popular constitutionalism puts its emphasis on popular misconceptions of constitutionalism and its American variant. Sotirios Barber has explored another kind of constitutional consciousness. Rather than checking public awareness against some constitutional scoreboard, Barber suggested the theoretical foundation for an individual's being "constitution minded" on her own terms. Barber says, "...a court cannot simply tell us the meaning of this Constitution; we have to see it for ourselves. Courts cannot achieve a constitutional state of affairs on their own."[12] Research in the public law field, however, with its focus on courts - especially the Supreme Court and on its product, the judicial opinion - rather than all the interactions of the whole process, encourages the myth of legalism that includes the idea that law is the special province of experts and can be known and understood to the public only through their mediation. Barber's call for everyone to be "constitution minded", not just the experts, is part of a larger concern of some in the public law field that research expand the domain of what is understood as the study of the law.

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[12] See Sotirios A. Barber, On What the Constitution Means (Baltimore: The Johns Hopkins University Press, 1984), p. 213.

Speaking to the topic of the appropriate direction of law and society research twenty years after those constructs were melded into a scholarly association and journal,[13] Susan Silbey and Austin Sarat called for attention to the minutiae of social life. In spite of American legalism's claim to the rule of law, at the periphery of American society - in small towns, rural places, working class neighborhoods - we can see people resisting "the penetration of official legal norms as they construct their own local universe of legal values and behavior."[14] Silbey and Sarat attribute this scholarly attention to the post-Viet Nam, Post-Watergate America in which our highest legal aspirations have been disappointed. They conclude that, "We need to stop trying quite so hard to come to terms with that ineffectiveness and to start studying what legal life is like in the vast interstices of law."[15] John Brigham's recent research on popular

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[13] The Law and Society Association and The Law and Society Review.

[14] See Susan S. Silbey and Austin Sarat, "Critical Traditions in Law and Society Research," Law and Society Review 21 (1987):173.

[15] See John Brigham, "Bad Attitudes: Survey Research, Civil Liberties and Constitutional Practice." Paper presented to panels on "Public Discourse and Law: The Role of the Citizen," Midwest Political Science Association, April 13-15, 1989; and "Legal Culture and Legal Claims," Law and Society Meetings, Madison, Wisconsin, June 8-11, 1989.

"attitudes" about the law versus expert opinion on the law has already moved into the domain suggested by Silbey and Sarat. Focusing on images of and "attitudes" toward property rights, Brigham explains the marginalization of the public in an area of special importance to them. The public becomes marginalized because it does not have access to the discourse of the law and bureaucracy which acts upon them rather than with them. Brigham writes that

> The authority of legal claims and the power of the government over property lies in determination about the way the world is, not about how people <u>feel</u> about it....All assertions of property rights are subject to correction and refinement by experts but the authority of the poor to participate in the discussion is substantially diminished by a lack of autonomy and the technical discourse of welfare property.[16]

While the courts, especially the Supreme Court, continue to command the most attention when the Constitution is discussed, there is a palpable constitutional consciousness in popular American politics that takes on the Constitution on its own terms that should command our attention as well. This was most recently apparent when 250,000 people marched in Washington to assert their view that <u>Roe v. Wade</u> was

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[16] See John Brigham, "Bad Attitudes: Survey Research, Civil Liberties and Constitutional Practice," p. 23-24.

correctly decided.[17] After all, the courts as passive agents can initiate nothing themselves, someone else must think first in constitutional terms and bring the claim to the Court only later, if at all. Yet this aspect of constitutionalism is too often unexamined in the leap to look at what courts ultimately legitimate as constitutional.

In addition, often when there has been integration of law and politics in the scholarship, the tradition in public law has been to look at lawyers, courts, and judges from the outside exposing the politics within. This is the particular contribution of the legal realists who showed that far from the law's being discovered on some special cloud above politics from which it occasionally rains down, law is in fact the result of the play of politics itself. Sheldon Goldman has pointed to four of those intersections: policy choices are made within a political context, decisions result from group bargaining, justices come to the

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[17] April 1989. Whether this demonstration influenced the Court or not we do not know but the capacity of a demonstration to influence the timing if not the content of a decision has been documented. According to David O'Brien, Chief Justice Hughes refused to hand down Powell v. Alabama (1932) in order to end picketing that had surrounded the Court. See David O'Brien, Storm Center (New York: W.W. Norton & Co., 1986), p. 277.

bench from an active public life, and politics generate the issues brought to the courts.[18]

My thesis extends this model to explain the interaction of law and politics taking place outside judicial institutions. I am interested in political activity generated by strongly held popular beliefs about the purpose and promise of the Constitution. Political activity like this may be pursued through legal institutions but does not begin or end with judicial opinions. The right-to-life / right-to-choose movements, the comparable worth movement, and the anti-violent pornography movement are representative of this sort of constitutional politics as are the four case studies developed in the chapters that follow. This research is what Martin Shapiro describes as the essential task of the political scientist - undertaking "the careful description of what one real person says to another real person, when, how, and why."[19]

My interest, therefore, is in noting popular conversations on the Constitution. These conversations are not aimed at mining the Constitution for a pre-

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[18] See Sheldon Goldman, Constitutional Law: Cases and Essays (New York: Harper and Row, Publishers, 1987), pp. 3-4.

[19] See Martin Shapiro, "Wither Political Jurisprudence: A Symposium." Western Political Science Quarterly 36 (1983):541-8.

existent right and then staking a legal claim on it.[20] The fact of a constitutional tradition is important. The written text, used to justify judicial review, provides us with words to read and discuss. Consequently, the Constitution must be understood not simply as rules but as a way of talking about things political. John Brigham argues that

> ...it is necessary to distinguish between the rules which designate certain procedures and the grammar which reveals the practices on which the procedures are based. The impact of grammar on a decision is far more subtle and potentially more revealing than the rules that we traditionally look to for insight into the role of law in judicial interpretation.[21]

The text and commentary provides the opportunity for what James Boyd White calls "interpretation as action."[22] And, it also keeps the discourse on rights and constitutionalism public.

This dissertation expands the domain of the public law field as it responds to the searching self-analysis that began in 1982 at the Western Political Science

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[20] For that activity, see, for example, Ronald Dworkin, Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977).

[21] See John Brigham, Constitutional Language: A Interpretation of Judicial Decision (Westport, Connecticut: Greenwood Press, 1978).

[22] See James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (Chicago and London: University of Chicago Press, 1984).

Association meeting in San Diego and continued into 1984, 1987, and 1988 at annual meetings of the American Political Science Association. At these meetings there were round-tables which asked about the future of the public law field in political science. The Amherst Seminar's answer in The Legal Studies Forum[23] several years ago was that the field should break out of the old confines of public law analysis with its emphasis on the appellate opinion by advocating joint research projects that come at the study of law and politics not only from more than one perspective but from more than one discipline. Rogers Smith of Yale reiterated the question in the Spring 1988 issue of the American Political Science Review.[24] Smith advocated applying the innovations in theory of the parent discipline of political science to the public law field. For example, he wondered what explanatory power the "new institutionalism" has for the study of law and politics. Its insight is that there is a symbiosis between institutions and political actors that influences the perspectives of both the institution and the actor. Smith notes that what goes before - previous judicial opinions - can determine not only

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[23] The Legal Studies Forum IX (1985).

[24] See Rogers Smith, "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law." 82 (1988):89-108.

future opinions but what gets into court at all. The past development of the institution can determine which voices are heard in court. Smith explained that

> Obviously, no group is likely greatly to influence an institution that will not attend to its voice. ... Thus, accounts of self interested rational calculations and the behavioral regularities they are thought to generate will have limited explanatory power if they are not sensitive to how legacies of past decisions lead people to think their interests should be so defended. Neglect of these factors may also prevent us from seeing how social definitions of interests appear much less rational, and much more vulnerable to alteration over time, when their origins are identified.[25]

William Connolly suggested this view several years before when he pointed to the importance of the "terms of political discourse." Connolly said then that

> the language of politics is not a neutral medium that conveys ideas independently formed; it is an institutionalized structure of meanings that channels political thought and action in certain directions. Those who simply use established concepts to get to the facts of political life, those who act unreflectively within the confines of established concepts, actually have the perceptions and modes of conduct available to them limited in subtle and undetected ways.[26]

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[25] See Rogers Smith, "Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law," p. 98-99.

[26] See William E. Connolly, The Terms of Political Discourse, 2nd Edition (Princeton, New Jersey: Princeton University Press, 1983).

For some groups, like out-of-work steelworkers, trying to get recognition for their idea of a right to the industrial property in their community, a "community property right," was an achievement in itself.[27] Their struggle fits the critique of the Critical Legal Studies[28] movement whose claim is that determining what appears, or is accepted, as rational when making a rational choice is the whole game. Brigham's work points here as well when he reveals welfare recipients' language being "corrected" or ignored by their caseworkers as they attempt to explain their own sense of their rights.[29]

Underlying these calls for innovation and new direction is a growing concern that the law schools are winning the battle to cover the public law field as they re-define it narrowly as doctrinal analysis and jurisprudence. We see this in the university as well when undergraduate courses on constitutional law are taught by political scientists as mini-law school courses utilizing the case method. This narrow

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[27] This struggle to establish in the polity the idea of a right to retain disinvesting industries as a constitutional right is detailed in chapter two within.

[28] Critical Legal Studies is a movement of legal scholars from elite law schools who are calling for a new left perspective on the law.

[29] See John Brigham, "Bad Attitudes: Survey Research, Civil Liberties and Constitutional Practice."

definition constrains our understanding of American constitutional interpretive practice by riveting our attention on the domain of the legal profession. Harry Stumpf attempts to move us away from the purely judicial decision and process mode by expanding the arena of the political jurisprudent to judicial politics that include bar association presidents, prosecutors, and law enforcement officials.[30] While casting the net further afield, this approach like those coming before continues to leave out of the analysis all actors not formally part of the legal process. Public law analysis should include these latter participants as well.

This study of the popular politics that, as constitutional interpretive practice, inform the way we understand the Constitution as a society is responsive to calls from within the field for new direction. It does so, in Judith Shklar's words of twenty-five years ago, by breaking through the ethos of legalism to expose the other important junctures of law and politics in American society. This research follows in the tradition of the work of Jack Peltason and Martin Shapiro who first called for a "political jurisprudence." Peltason did the path breaking work in

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[30] See Harry Stumpf, American Judicial Politics (San Diego: Harcourt Brace Javanovich, Publishers, 1988).

his Federal Courts in the Political Process in which he described judges as participants in the political process.[31] He put his emphasis on process rather than product (i.e., the appellate opinion.) With this changed structure of analysis, Peltason looked at the federal courts as part of the larger politics of interest group struggle. Martin Shapiro endorsed this work in his 1964 essay, "Political Jurisprudence" giving this new approach its name.[32] Shapiro contributed further not long after in Law and Politics in the Supreme Court by analyzing the Supreme Court as an agency of government.[33] This new frame of reference helped to further refine political jurisprudence.

In spite of these insights which recall the earlier vision of Jerome Frank who had long before called our attention to the "upper court myth" in the 1930's and 1940's, public law has still not weaned itself enough from the appellate decision as the focus of its attention.[34] To call our attention not only to

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[31] See Jack Peltason, Federal Courts in the Political Process (New York: Random House, 1955).

[32] See Martin Shapiro, "Political Jurisprudence." Kentucky Law Journal 52 (1964):294.

[33] See Martin Shapiro, Law and Politics in the Supreme Court: New Approaches to Jurisprudence (New York: The Free Press, 1964).

[34] See Jerome Frank, "The Cult of the Robe," Saturday Review 29 (1945):12.

the decisional process but also to the forces and influences that impinge upon that process, Harry Stumpf titled his recent text American Judicial Politics rather than "judicial process." In this work, Stumpf reviewed research that explains the legal profession, judicial selection, the state and federal court systems, and the criminal justice system in terms of the polity that constitutes those systems. Austin Sarat extended this model to what he calls "extended case discussion" which looks at the politics that lead up to, encompass, and lead away from the case itself.[35] What forces align to transform a political claim into a legal one? What is the purpose of litigation in a particular case? A means? An end? What politics eventuate from the decision?

By attending to these details, we see the larger picture of law and politics. More important for the field, it is attention to these details that is the particular forte of political scientists. The law schools can remain riveted to the appellate case but political scientists must explain that case in the context of politics. Further, political scientists must explain the role that law, itself, plays in

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[35] See Austin Sarat, "Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistance of a Research Tradition," Legal Studies Forum 19 (1985):23.

politics. Several years ago, Walter Murphy[36] called on political scientists to regain their rightful place as interpreters of the Constitution and the politics that surround it. In this vein, Murphy developed his own model of constitutional interpretation that he called a "modified departmentalism."[37] There he posited a theory of separation of powers and constitutional interpretation that gave to each branch an ultimate say in those areas of greatest concern to it.

Clearly, the calls for the integration of law and politics have not fallen on deaf ears in the public law field but they have still elicited too few responses that are not structured around legal institutions and judicial doctrine which serves to reinforce the purely legal model of constitutionalism. Louis Fisher is one who does go beyond this purely legal model to examine the executive and legislative branches for their constitutional interpretive practices.[38] He offers evidence of interpretive activity in all three branches

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[36] See Walter F. Murphy, "Who Shall Interpret?" The Political Science Teacher 49 (1986):10.

[37] See Walter F. Murphy, "Who shall Interpret? The Quest for the Ultimate Constitutional Interpreter," The Review of Politics 48 (1985):401-23.

[38] See Louis Fisher, Constitutional Dialogues (Princeton, New Jersey: Princeton University Press, 1988).

that contributes to our full understanding of the Constitution. While this activity by the three branches is not new, the understanding of it all as contributing to constitutional interpretation is. Fisher shows that the Supreme Court is neither the only constitutional interpreter nor the final one.

Stuart Scheingold is another who stimulated new thinking some years ago as he exposed new truths about the efficacy of rights struggles using litigation strategies. He concluded then that legal strategies, as they aim deep at the transformation of cultural awareness and assertion, work only as political mobilization mechanisms. Nevertheless, he argued, litigation is viable politically because, even though it does little to affect institutions and power holders per se, it does serve as a rights consciousness-raising force popularly. Using doctrinal analysis put in its historical and political context, Jonathan Casper showed this as well. He, like Shklar, argued against the tradition of viewing legal doctrine in isolation from the larger society of which it is a part. Casper responded to the lament that the courts should stay out of politics and stick to deciding legal questions on legal grounds with the assertion that constitutional issues do not simply involve fine points of law but rather the allocation of values. Legal tools -

reasoning by analogy, stare decisis, etc. - can be brought to bear on the problem but constitutional interpretation itself remains always a political problem that should not be separated from political analysis.

For Harvard Law Professor, Martha Minow,[39] a written constitution is the starting point of discussion. It is not so important that particular actions are protected or prohibited but rather that we are constituted as a community by the Constitution and with it have a basis on which to make claims about what is or is not embraced by that community. This is also what Sotirios Barber[40] is talking about when he calls on everyone - not just judges and lawyers - to be "constitution minded." Barber does not deny the special authority of judges but he also calls on us as citizens to form and express our own view of "what the Constitution means."

We must decide for ourselves what the Constitution means because our view contributes to what Gerald

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[39] See Martha Minow, "Interpreting Rights: An Essay for Robert Cover," Yale Law Journal 96 (1987):1860.

[40] See Sotirios Barber, On What the Constitution Means (Baltimore: Johns Hopkins University Press, 1984).

Garvey[41] calls "constitutional bricolage." Bricolage is the French word for the process by which a craftsman fabricates "'make-do' solutions to problems as they arise, using a limited and often severely limiting store of doctrines, materials and tools..."[42] With constitutional tools the judge or craftsman can build a consistent body of constitutional doctrine. Constitutional bricolage - what materials and tools are available to the judge - reflects the larger process of society's trying to maintain its consistency and identity over time which Garvey calls society's syntax. Because society's syntax informs and limits judges' doctrinal choices, important politics take place at the level of constructing and reconstructing that syntax. The Constitution, then, should be understood not as a blueprint for a community but rather as a facilitator of social conversation on what constitutes the community, not the document.[43] Consequently, interpretive constitutional discourse is important constitutional politics.

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[41] See Gerald Garvey, Constitutional Bricolage (Princeton, New Jersey: Princeton University Press, 1971).

[42] See Gerald Garvey, Constitutional Bricolage, p. 5.

[43] See Martha Minow, "Interpreting Rights: An Essay for Robert Cover" for further discussion of this idea.

When someone - political activist, scholar, legislator, citizen - claims to know the promise or parameters of the Constitution, she is participating in constitutional interpretive practice. The aim is not always to affect specific policy outcomes but more often to construct the arena within which those policy choices must be made. This is the struggle to shape the community's definition of itself. It is the struggle for the ascendant idea or, in Garvey's words, to determine society's syntax. This is the heart of constitutional politics.

Constitutional politics are politics that focus on and make claims about the meaning and promise of the Constitution and thereby of American life. My overarching thesis is that the public law field has led us astray with its contribution to our understanding of American constitutionalism. It has focused on the Constitution in the appellate courts, especially the Supreme Court, when the full picture of American constitutional politics is more than this. Therefore, this dissertation looks at the politics that often point toward the Supreme Court but do not begin or end there. The Court is one obviously very important arena in which these politics are played out. There are others, however, that contribute to the picture: the Congress, the academy, the community, and the state

forums for the amending process as examples. The chapters of this dissertation are devoted to each of these arenas.

Chapter One turns to the academy to follow the discourse on the Constitution of those scholars who teach the future Supreme Court clerks, practitioners, judges and justices as well as those who write the record of that discourse - academic lawyers and legal historians. This chapter offers an analysis of a Bicentennial Conference on the Constitution. Here, my attention is on the vocabulary of the discourse and the conference theme of "difference." The conference, entitled "Rights and Constitutionalism in American Life," was sponsored by the Department of History of the University of Massachusetts at Amherst and The Journal of American History. Employing textual analysis of the conference papers, I show what these scholars consider to be the important popular discourse on the constitutional text. While the legal profession dominates constitutional interpretation, it has not shut all others out of the discussion. The pervasiveness of popular American rights consciousness which these scholars reveal is a little studied feature of American legal and constitutional life.

Chapter Two builds on the conference by focusing on an outgrowth of one of the conference papers. One

of the conferees, labor lawyer and political activist Staunton Lynd, has put into practice the theoretical discussion of the rest of the conference. The case study is qualitative textual analysis of workers' and communities' proselytizing tracts, amici briefs, journal articles, and newspaper accounts of political activity. I also interview the chief strategist, Staunton Lynd in order to put constitutional politics in context. This is a study of the use of eminent domain by communities as a mechanism to realize their claim of a constitutional right to industrial property. The genesis of the idea of this constitutional right was born in the steel communities of Youngstown, Ohio and Pittsburgh, Pennsylvania. I trace the fight against corporate disinvestment within these two communities as well as outside them where this constitutional claim has surfaced. The communities which are pursuing this course against corporate disinvestment are threatening to use their eminent domain power to bring to bear their own constitutional interpretation.

Chapter Three examines the commonly held notion that the Supreme Court has the final say on the Constitution. Franklin Roosevelt endorsed this view when he urged Congress to pass his New Deal legislation even with misgivings and "let the Supreme Court worry

about the constitutionality."[44] At another time, William O. Douglas said, "The Court is really the keeper of the conscience, and the conscience is the Constitution."[45] Douglas' colleague, Robert Jackson, also laid claim to the Court's finality when he said in Brown v. Allen, "[the Supreme Court] is not final because we are infallible, but we are infallible only because we are final." It is not just the Court that has this perception, however. When someone feels injured in some measure, the commonest cry is "I'll fight this all the way to the Supreme Court!"

In INS v. Chadha,[46] the Supreme Court declared the legislative veto unconstitutional. However, since that decision was handed down in 1983, Congress has incorporated 53 legislative vetoes into 18 pieces of legislation at last count.[47] This fact of life in Washington has to be taken account of if we are to know the full picture of constitutional interpretive

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[44] Donald Grant Morgan, Congress and the Constitution: A Study of Responsibility (Cambridge: Belknap Press of Harvard University, 1966), p.15.

[45] Comment in an interview with Eric Sevareid. Quoted in Michael Kammen, A Machine That Would Go of Itself (New York: Alfred A. Knopf, 1986).

[46] 462, U.S. 919 (1983).

[47] See Louis Fisher, Constitutional Dialogues, p. 234.

activity. Chapter Three explores Congress' use of its specially established law firms to articulate its own interpretation of the separation of powers doctrine.

The purest constitutional interpretive practice is, of course, the amendment process. As Judge Gibson reminded us in Eakin v. Raub,[48] it is the people who have the ultimate say on the Constitution. Chapter Four looks at what the people had to say in Connecticut when asked to call for a second constitutional convention. In periods of dissatisfaction with Supreme Court decisions or with congressional acts there is a resurgence of constitutional amendment politics. Most recently these politics have arisen over the issue of a balanced budget amendment. Unlike those involved in the movement politics of community property rights, the activists here are usually elites. Like their forebears who wrote the original document, these interpreters are comfortable wielding power and therefore one might expect them to have the confidence to take the document, itself, into their own hands and, if necessary, remold it at a second constitutional convention. This is the ultimate in constitutional interpretive activity. From the testimony taken in Connecticut before that state's decision not to call for a second constitutional convention, however, we can

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[48] 12 Sergeant and Rawle (Pa.S.Ct.) 330 (1825).

see that these elites are fearful rather than confident that the Constitution could be safely taken in hand by today's interpreters.

The politics in these four chapters are emblematic of the constitutional interpretive activity of that segment of the American polity that defines its politics by the Constitution. Together they form much of the larger picture of American constitutional interpretive practice that takes place outside formal legal institutions. Ultimately, these constitutional politics make significant contributions to the syntax of American constitutionalism. However disparate the arenas, however disparate the actors, they are all bound together by a single document and a shared sense that they all know what the language of that document means. What is of interest to us as political scientists, however, is not so much the content of their interpretations but that they all are participating in constitutional interpretive activity. This is the political activity that contributes to the larger picture of American constitutional politics which this dissertation examines.

CHAPTER 2.

CONCEPTIONS OF CONSTITUTIONALISM: THE BICENTENENNIAL IN THE ACADEMY

Nineteenth Century blacks, women, and labor activists held conventions, gave speeches, wrote pamphlets and each other proclaiming their alternative vision of the promise of the Constitution. In some cases they were convincing to us all (e.g., black men should have the vote), in other cases only to each other (e.g., the Constitution already included women). In every case, however, they were involved in giving definition to the document. Scholars at a 20th Century Bicentennial Conference re-examining these views - both those that won out and those that did not - give new voice to their vision.

Introduction

This chapter explores the kind of constitutional consciousness suggested by Sotirios Barber -- an attitude of aspiration toward reaffirming the Constitution's ways as one's best conception of the good society. Barber says that

> This constitutional frame of mind is poorly distributed and either cannot exist or cannot generally be known to exist where genuine reaffirmations of the Constitution are replaced by a widespread acquiescence in the imposition of some monopoly. Although we can agree with what others say about the Constitution, it is simply impossible for

> someone to tell us the meaning of this law; to understand it we have to understand it for ourselves.[1]

The particular focus of this chapter is a bicentennial conference on the Constitution. The conference also provides an opportunity to take up Richard Abel's challenge to construct a new paradigm for the study of law discussed in the introduction. Abel's call for new perspectives reverberated throughout the disciplines studying law and society especially loud in the year of the Constitution's Bicentennial.[2] Constitutional study that year stimulated a self reflection. In The Chronicle of Higher Education, constitutional scholars lamented the dearth of fresh scholarship in response to the Bicentennial celebration.[3] When Project '87 was formed a decade before through a joint effort of the American Political Science Association and the American Historical Association to promote the Bicentennial of the Constitution, the goal for the project was to stimulate serious new academic research on the

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[1] See Sotirios Barber, On What the Constitution Means (Baltimore: Johns Hopkins University Press, 1984), pp. 197-198.

[2] See Stewart Macaulay, "Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports," Law and Society Review 21 (1987):185.

[3] See Karen Winkler, "Scholarship," The Chronicle of Higher Education, March 4, 1987.

Constitution and to improve public understanding of its history and place in contemporary society. According to those attached to Project '87, the latter goal was largely realized. Where the project failed, however, was in fostering the hoped-for new scholarship. Analysis of the impact of the Constitution's Bicentennial celebration was that it was making little impression on research in the fields where the Constitution is most studied - history, law and political science.[4]

This desire for the Bicentennial to generate new and different scholarship was shared by the historians and academic lawyers who organized a conference at the University of Massachusetts at Amherst in the fall of 1986 to explore the social history of American constitutionalism. While the legal profession dominates constitutional interpretation, others are joined in the debate.[5] The pervasiveness of American rights consciousness, which is evidence of this, is a

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[4] See generally Karen Winkler, "Scholarship."

[5] See Frank S. Lucash, ed., Justice and Equality Here and Now (Ithaca: Cornell University Press, 1986); Judith Baer, Equality Under the Constitution (Ithaca: Cornell University Press, 1983); Roland J. Pennock and John W. Chapman, Constitutionalism (New York: New York University Press, 1979).

little studied feature of American legal and constitutional life which was addressed at the conference.

Sponsored by the Department of History at the University of Massachusetts in conjunction with The Journal of American History (which devoted its December 1987 issue to these conference papers), the conference took the title "Constitutionalism in American Life." Thirteen historians and legal scholars gathered to explore the general theme of constitutionalism as well as relationships between group identity and constitutional history. This chapter addresses several questions as a way of placing the Bicentennial Conference in the context of American interpretive practice. When they spoke of constitutionalism, to what did they refer? Where did they look for evidence of popular rights consciousness? Did they break out of the traditional structure for constitutional analysis (i.e., judicial doctrine)? In employing textual analysis of the conference papers, one can mark the concepts informing the constitutional discourse taking place outside formal legal institutions, as well as the activity that discourse inspires.

From conversations with the conference organizers,[6] it was clear that their vision for the conference was that it produce scholarship different from the conventional practice of constitutional history which has failed to account for the pervasiveness of American rights consciousness in the face of legal positivism. Therefore, they looked for evidence of constitutional consciousness and practice outside the context of ahistorical doctrinal analysis and beyond the development of the institutions born of the document.

The conference was broken into two symposia. Symposium I approached constitutionalism from the perspective of the impact of the Constitution on American development over 200 years in each of four areas: economic life, politics and government, race relations, and diplomacy. Symposium I, with its more traditional approach to constitutional history, is not addressed directly in this paper. It is significant, however, that the organizers of Symposium II chose to set it apart from Symposium I in order to emphasize

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[6] Hendrick Hartog, University of Wisconsin Law School, Madison and Robert Griffin, Chairman, Department of History, University of Massachusetts, Amherst.

that their conception of constitutionalism and constitutional scholarship was different.

Where one symposium painted American constitutional history in broad strokes emphasizing main themes that explained institutional, economic, race and international relations vis a vis the Constitution, the second looked to the minutiae of social history to reveal American constitutional culture. In the organizers' words, "The purpose of the symposium would be to explore some relationships between group identity and constitutional discourse and debate through the course of American national history".[7] The organizers of this symposium held the view that not only have perceived understandings of constitutional entitlements and disabilities shaped group identities, but public understandings of what the Constitution guarantees have been changed fundamentally by the participation of diverse social groups. In other words, not only have rights activists taken cues from judicial opinions, their activity, as well, informs our common sense of what the Constitution

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[7] Conference announcement.

means. Furthermore, there is evidence that popular constitutional politics influences U.S. Supreme Court opinions.[8]

The claim of conference organizers that their scholarly endeavor is different from traditional constitutional scholarship with its attention on doctrinal development is one measure I apply to the conference. Specifically, I consider what it means that a new (different) perspective on the Constitution is being offered. What, if anything, in these papers is different from other research on the Constitution? Part of the claim to difference is rooted in an additional aspiration of the organizers to use the conference for "vocabulary building." I, therefore, also look for evidence of that effort. The conference offers its analysis of American political culture surrounding the Constitution and, at the same time, forms a piece of that culture itself. This is especially true since the organizers aspired both to explicate ideas already held, but obscured to us, as well as to influence the structure and content of further thought on the Constitution.

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[8] See Leslie Friedman Goldstein, "The ERA and the U.S. Supreme Court," Research in Law and Policy Studies 1 (1987):1.

While the conference papers can certainly stand on their own, they are of most interest when taken as a whole. It is their combined purpose that tells us about the Constitution in the academy. The organizers of the conference did not want to leave it to chance that their view of constitutionalism as rights consciousness would be addressed in an undirected call for papers. Consequently, they sought out scholars whom they knew to be involved in work on rights consciousness and the social history of the American Constitution. The result of this deliberate organization is an endeavor that is larger than the sum of its parts. What we learn from each paper is enhanced by the order in which it is given as well as by its being one of several bricks in a scholarly edifice of constitutionalism as rights consciousness. This method of organization is itself unusual. While it is not remarkable that specific scholars be invited to participate, it is clearly a different enterprise when a gathering is organized around a general call for papers rather than as this one was. In the latter event, both the content of the papers and the orchestration of the conference claims our attention because both tell us something about current American constitutional scholarship.

The Conference Papers

Rice University historian Thomas Haskell,[9] laid the foundation for legitimating the activity of the conference itself. His paper opened the discussion with an exploration of competing views in jurisprudence. He posed natural rights philosophy which holds that law can and should be deduced from the higher principles of the laws of nature against the Nietzschean view, or historicism, which denies the possibility of establishing any such transhistorical and transcultural standard. Haskell's purpose was not to resolve this debate, but to show the ground in between where a debate on rights can stand.[10] That is, he sought to expose the territory between two competing views where the discourse of rights is in fact taking place and where that discourse makes sense to us even in the absence of a consensus on natural law philosophy. Haskell grants historicism's claim that rights are social conventions. This does not, however,

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[9] See Thomas L. Haskell, "The Paradoxical Persistence of Rights Talk in the `Age of Interpretation,'" Paper presented at The Journal of American History Conference at Amherst, Massachusetts November 7-8, 1986.

[10] For another attempt to map the ground between ideologies in the search for justice see Richard Rorty, Contingency, Irony & Solidarity, (Cambridge: Cambridge University Press, 1989).

mean when we understand rights in this way that we do not have substantial knowledge. He asserts, "By mapping more precisely the pale beyond which morality is irredeemably historical, we do of course concede some territory to the criterionless wilderness.... But we also demarcate the zone within which rights and other claims to objective moral knowledge can enjoy something like 'universal' sway.... [And this] is also all we need".[11]

Haskell is saying we do not need to have a conception be "true to an order antecedent to and given to us" in order to justify it. He offers a territory between Reason and History where we can root our conceptions of justice, rights, and equality. This territory is described by persisting social conventions. These conventions, however, are open to rational criticism and are flexible in response to changing technology. Haskell opens his conception of "technology" to include events like the post-1750 Western movement toward humanitarianism. This, according to Haskell, came about not because the Golden Rule was unknown before but because what was conceived of as natural and unchangeable came to have new meaning. What before had been seen as not available to

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[11] See Thomas L. Haskell, "The Paradoxical Persistence of Rights talk in the 'Age of Interpretation,'" p. 34.

human intervention came to be within the power of humans to affect. Thus, a change in technology (the power to help others) precipitated a change in the conventional conceptions of how one treats one's fellow humans. In giving to the meaning of rights the concept "social conventions" Haskell suggests where we fall off the track in our attempts to give meaning to other concepts. We think we must limit our choice to one of two extremes - Reason & Natural Law or Interpretivism/Historicism. We live, however, in between and it is there that we should look for meaning in our discourse.

Conference case studies in women's, blacks', workers' and the family's perceptions of and mobilization around rights issues looked for that meaning. Women, blacks and workers comprise groups that pursued formal legal recognition of their rights as well as developed within this activity their own conceptions of what rights, constitutionalism, and justice mean. They and their activity is of interest not simply because they claimed to have rights but because they worked to influence the meaning society as a whole gave to these rights claims. Their sense of what the Constitution means came from within themselves and from the debates they held, not just from positive law. This is emblematic of James Boyd White's

"interpretation as action."[12] Certainly, these groups acceded to the authority of the courts but that is different from saying they embraced the interpretation the courts put on the Constitution. Inviting papers dealing with women, blacks, workers and the family, the conference organizers showed that constitutionalism defined as rights consciousness permeates society. This reinforces the conference claim that constitutional practice is not the special province of the courts alone; that important aspects of constitutional meaning can be found in doctrinal analysis but the full flowering of the Constitution takes place in social discourse.

Social historian Ellen DuBois[13] of the State University of New York at Buffalo echoed Haskell's theme of the conventional nature of rights. Again the claim is made that rights must be understood in their historical setting in order to make full sense of them and so that we are not drawn into the misconception that previous ideas about rights are rooted in Nature

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[12] See James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (Chicago and London: University of Chicago Press, 1984).

[13] See Ellen Dubois, "Girls Just Want to Have Rights: Equal Rights, Woman Suffrage and the U.S. Constitution, 1820-1875," paper presented at The Journal of American History Conference at Amherst, Massachusetts November 7-8, 1986.

or Reason rather than in the conventions and politics of their time. DuBois' contribution is to trace the development of the demand for political equality for women through nineteenth century feminist debates. Her case study peels back the top layer of the women's rights struggle (the results) and exposes the politics and circumstances affecting and shaping the women's suffrage movement. DuBois shows that the ultimate triumph in the 19th Amendment was not the original aim of the earliest women's rights activists. By the end of the original women's rights struggle, rights came to be claims against the state, a negative force against governmental power centered in the call for a constitutional amendment. Early on, however, women saw rights as positive guides for a benign government already inherent in a constitution that did not require amendment to include women. Early feminists called upon women to assert the rights already there. DuBois sets straight the historical record to show how conceptions of rights come from social debate (the struggle for the ascendant idea) by recapturing the specifics of that debate.

The claim that her research is different comes from where she looks to find the discourse of rights. Scholarship that focuses on formal convention reports and judicial doctrine leaves the impression that the

way an age or culture understands itself is in one coherent voice. Those historical artifacts, however, reveal more about the politics than the social history and culture of their time. This Bicentennial Conference called our attention to the discourse brought to the women's rights conventions and the struggle that took place there rather than the judgments or compromises that came out of those conventions. If rights are invested with conventional meaning that, while flexible, is still rooted in past conventional understanding, then it is important to be fully clear about what that past understanding was. It is meaningful in today's struggle to know that a view resonates with the past even if it were a past view that failed to carry its own day.

The question that remains, however, is how to recapture that full discourse. For the participants in this conference, the answer is to look at the whole field of ideas surrounding the Constitution that were taken seriously in their own day. Our culture and social conventions are formed not only by the ideas or compromises that win out, but also by those that do not gain ascendancy and by the tensions in between.[14] In a

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[14] The classic work depicting the arguments of the losing side is Herbert J. Storing's account of the arguments against the U.S. Constitution promulgated in 1787. See Herbert J. Storing, What the Anti-Federalists were For (Chicago and London:

postscript, DuBois recalled two speeches made at the 1878 Woman Suffrage Convention that, in contrast with each other, show the range of the rights discourse within the women's movement. Her reading of nineteenth century feminism is that many did not see rights as narrowed to a principle for prohibiting government action. The politics that led feminists to the strategy of a woman's suffrage amendment have obscured their other discourse on rights, equally important to their day and ours, that sees rights as inherent, not given, and as a positive guide for government.

Columbia University historian Eric Foner's[15] research on 19th century blacks confirms DuBois' claim of a common sense of rights as positive guides for government rather than a negative claim against government. Foner, too, looked at convention speeches as well as private letters of newly freed blacks to show that their conception of freedom was rooted in their sense that participation in politics -- to which they had a right -- was their best protection. The Declaration of Independence and, after the 14th Amendment, the Constitution made their claims to

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University of Chicago Press, 1981).

[15] See Eric Foner, "Rights and the Constitution in Black Life During the Civil War and Reconstruction," paper presented at The Journal of American History Conference at Amherst Massachusetts, November 7-8, 1986.

political equality with the white man meaningful. By looking at the record they left in their private letters and Reconstruction Convention speeches, Foner uncovered the popular constitutional consciousness of 19th century blacks. While blacks failed to impose on the rest of society their interpretation of constitutional protections as issues of federalism and racism surfaced, they nevertheless formed their own constitutional conceptions and tried to foster their ideas in others. The conference shows that there was ongoing popular discussion of the meaning given to the Constitution in the 19th century and that, while political expediency swept aside these discussions at the time, they left a legacy of popular constitutional consciousness and conceptions of rights that continues to be called on today.

This Bicentennial Conference's view of constitutional politics as a positive force assumes that law is a logical and fertile arena within which to bring about needed social change. This is, of course, problematic. As discussed in the introduction, Richard Able objects to this wholly positive view because, with its focus on law and social change, it "distracts attention from law and social stasis".[16] This concern

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[16] See Richard L. Abel, "Redirecting Social Studies of Law," Law and Society Review 14 (1980):805.

was shared by University of North Carolina historian Leon Fink as he raised the issues of false consciousness and cooptation in relation to constitutional activism.[17] Fink also looked to private papers and convention speeches as well as union pamphlets to reveal labor's historical perception of the Constitution.

From the beginning of the labor movement, workers' public self-definition has been shaped by legal and constitutional principles. The problem in this for workers, according to Fink, is that their commitment to work within the framework of American laws and economic institutions has meant that they have had to contend with definitions of their activity made on others' terms. Even so, however, workers did share the vision of women and blacks that even if the courts could not see it, the Constitution did speak to them and their needs. Their special problem was translating the Constitution into the language of collective rather than individual rights. It is at this intersection that DuBois' attention to a vision of rights as a positive force for the welfare of the community as a

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[17] See Leon Fink, "Labor, Liberty, and the Law: Trade unionism and the problem of Collective Action Within the American Constitutional Order," paper presented at The Journal of American History Conference at Amherst, Massachusetts, November 7-8, 1986.

whole becomes especially important to workers' claims that collective action was within the spirit of the Constitution. Having a problem different from that of women and blacks, however, workers pursued a different legislative and legal strategy which left them at the mercy of conservative courts for the definition of both their rights and their activity.

Concentrating on the Samuel Gompers era in the history of the American Federation of Labor (AFL), Fink drew a distinction between early labor history and that of the "Gilded Age." Artisanal republicanism had greatly helped to get the Constitution ratified but as the legal institutions came to be controlled by employers, law and the legal system took on an entirely different meaning for American workers. The Constitution was no longer their shield but rather the weapon of the capitalist. Looking at the convention speeches and union pamphlets to map this change in the constitutional consciousness of American labor, Fink showed American labor's frustration with judicial "reinterpretation" of the Constitution. The interpretation they themselves gave the document, evident in their speeches and pamphlets, imported to the Constitution a sense of rights that embraced and protected collective action. Labor could neither persuade the courts to their view, however, nor leave

aside constitutional activity. Fink's examination of Labor's constitutional discourse reveals the American labor movement long puzzling over how to take advantage of the law and the opportunities available through the political structure.

Like workers and the Constitution, the family and the Constitution has problematic connections. What is most interesting about Harvard law professor Martha Minow's conference paper,[18] however, is not the connections she shows but what she reveals in the skeleton of her scholarship on the topic. In a prefatory note, Minow explained that she had done little actual research on her topic because she had devoted most of her time to "shaping a sensible set of questions connecting 'family' and the themes of this conference."[19] Consequently, hers is a real "working paper" and allows us the greatest insight into the attempt to bring a different perspective to the study of American constitutionalism. Minow was not sure it made sense to include the family in those groups that

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[18] See Martha Minow, "Rights Consciousness and American Families," paper presented at The Journal of American History Conference at Amherst, Massachusetts, November 7-8,1986.

[19] See Martha Minow, "Rights Consciousness and American Families," p. 1.

made their claims and drew their identity from legal institutions. Consequently, she approached her task for the conference hesitatingly.

In laying out her concerns and questions explicitly, she cast in sharpest relief the themes and purposes of the conference. Where are rights located in the family? In the individual? The group? Who should answer this? Courts? Political activists? The family, itself? She wondered how to dig beneath legal texts for lay consciousness about the meanings of rights and for contrasting sources of meanings about rights. This shows us two things. First of all it shows that the challenge to historians and academic lawyers to find popular constitutional consciousness is a sensible task, but not an easy one. In addition, Minow's being at first stumped as to where her sources lie lends credence to the claim that this scholarship is indeed different for at least some of the participants.

Ultimately, Minow strained to fit her understanding of law and the family into the conference's theme of rights consciousness. In fact, she concluded, "Rights consciousness is an intriguing but problematic lens through which to re-examine the

history of the family...."[20] She commented earlier that there is more evidence of the metaphor of "family" in rights discourse (fraternity, sisterhood, community) than there are rights metaphors in the discourse on the family where the language is more that of "duty" than "rights." Minow's conclusion that the American family has not articulated a self-conscious constitutionalism leads to other issues. What was clear to Minnow was "that dimension of rights consciousness and the family that concerns the popular conception of the family as the locus for children's learning -- including their learning about rights"[21]. In addition to learning about rights, however, 19th century children were to learn from the family environment a respect for authority and self-restraint. Rather than showing the development of a rights consciousness, Minow's research on the family shows some of the tensions within the larger constitutional system. In addition to rights, there are duties. In addition to the individual, there is the family or community. Interests, needs and rights overlap here.

The conference's four case studies revealed not just the fullness of the spectrum of constitutional

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[20] See Martha Minow, "Rights Consciousness and American Families," p. 31.

[21] See Martha Minow, "Rights Consciousness and American Families," p. 31.

consciousness in American life but the tensions within it as well. Fink was especially good at capturing the dilemma of integrating individual and collective rights claims. What happens to the individual when she is subsumed within the union or the family? There are multiple loci of rights which surface most clearly in labor's discourse of rights. Fink's study shows that workers have, themselves, been ambivalent about where they wanted their rights to lie. This ambivalence has persisted into contemporary labor history.

Historian and lawyer, Staunton Lynd[22] brought labor's historical struggle with constitutionalism into the present with his study of a steelworker union local's attempt to save jobs through appeal to constitutional rights (detailed in Chapter Two). Here was constitutional rights consciousness at work within the conference's model. Lynd's study, using public speeches, union newsletters, and pamphlets, documented the genesis of a new constitutional claim formulated and promulgated outside legal institutions. In Lynd's words, "What one saw in Youngstown and Pittsburgh during the decade considered in this study was a community of worker-intellectuals doggedly pursuing the

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[22] See Staunton Lynd, "The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburg, 1977-86," paper presented at The Journal of American History Conference at Amherst, Massachusetts, November 7-8, 1986.

idea of a community right in industrial property, step by pragmatic step, arriving at proposals fully as radical as any previously proposed, yet framing them democratically, and in the American grain, in such a way as to bring others along with them."[23]

The success Lynd claimed for the project was a limited one. A lack of adequate financial resources deprived the workers of realization of their constitutional claim. For the conference's purposes, however, the steelworkers' union was hugely successful. Their experience showed what it is like to tap a constitutional consciousness. Furthermore, it confirmed Haskell's thesis that we can call on our understanding of social conventions rather than natural law to give authority to our rights claims. Lynd said the steelworkers' local was successful at least in setting the terms of the debate because the workers framed the discourse of rights "in the American grain." The workers' claim of a constitutional right's being involved in their struggle was successful because it resonated with middle-America's sense of what the Constitution promises.

What is especially interesting about the steelworkers' success is that the Pittsburgh/Youngstown

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[23] See Staunton Lynd, "The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburg, 1977-86," p. 47-48.

community accepted the steelworker local's constitutional interpretation in spite of its formal rejection by a court. Implicit in popular constitutional activity is the idea of multiple constitutional authorities. If the courts were the only recognized authority on the Constitution, rights activists would devote themselves to talking only to judges and lawyers instead of to each other and the public.[24] In her paper, University of Connecticut law professor Carol Weisbrod showed how religious groups have historically successfully competed for authority over the meaning of the Constitution.[25] Weisbrod's thesis is that the Constitution as an institution has to some degree recognized multiple authorities and to some degree made room for them. The tensions between the claims of families and communities and individuals tell us something about the place for multiple authorities in the American constitutional order. Weisbrod recalled that from our earliest moments as a people, the church has competed with the state for

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[24] See Louis Fisher, Constitutional Dialogues (Princeton, New Jersey: Princeton University Press, 1988) for an excellent explication of both the normative and empirical argument against the Supreme Court as the ultimate interpreter.

[25] See Carol Weisbrod, "Family, Church and State: An Essay on Constitutionalism and Religious Authority," paper presented at The Journal of American History Conference at Amherst, Massachusetts November 7-8, 1986.

authority over various aspects of our lives. This is especially obvious in the area of family law. The history of religious groups' struggles to define 1st Amendment religious claims on their own terms shows a competition among these groups, themselves, over whether the amendment should be understood to mean the state is to leave the church alone in its recognized sphere or whether it is to recognize the church's and the state's overlapping concerns and authority. It is part of our constitutional practice, then, to submit to the courts but our sense of what the Constitution means to us as individuals or as members of groups can and does come from other sources as well. Weisbrod's study showed not only the fact of this but also that the American constitutional system has accommodated this fact.

Part of the orchestration of the conference included inviting Georgetown University Law Center legal scholar, Mark Tushnet, to offer a counter view. While Tushnet was not as negative or critical as he was expected to be,[26] he nevertheless presented a different view of the nature and consequences of constitutional consciousness. Tushnet saw the ambiguity and open texture of the Constitution as problematic for rights-

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[26] From author's conversation with Hendrick Hartog of the University of Wisconsin Law School, October 23, 1986.

conscious groups rather than as a broad foundation on which to stake claims. He came to this conclusion after researching the point in the NAACP's history when W.E.B. DuBois resigned from that organization over his differing view of the strategy blacks should pursue to gain full equality. Tushnet saw the struggle of those who tried to give content to the constitutional concept of equality as divisive and distracting. He said, "The Constitution provided a framework within which political alliances could form, but its ambiguities meant that alliances formed to achieve equality might fragment when some participants found it necessary to specify more precisely what they meant by equality".[27] Rather than seeing constitutional consciousness as the tie that binds, Tushnet saw skillful political action as holding alliances together and, consequently, did not see a difference between a constitutional and a political commitment to equality. To Tushnet, the Constitution seems more of a hindrance than a help when it comes to achieving rights.

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[27] See Mark Tushnet, "The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston," paper presented at The Journal of American History Conference at Amherst, Massachusetts November 7-8, 1986.

Conclusion

The Conference articulated multiple themes and was not as coherent as this research may suggest. One of the organizers had hoped that the conference would be an opportunity to do some vocabulary building but he did not see much of that taking place.[28] What he had in mind when he spoke of vocabulary building is not clear but it appears that the conference implicitly, if not explicitly, defined its own terms. It defined constitutionalism as rights consciousness when it separated one symposia from the other and invited participants to the second symposium who spoke of constitutionalism only in terms of rights. Further, the conference defined rights as social conventions. This can be inferred from the fact that no debate emerged in the conference about what rights are. In addition, Haskell's model of rights discourse rooted in the "in between territory where we live" was implicitly taken on by all participants.

The effort to be "different" was an important issue for the conference. Its goal was to generate scholarship that looked in places other than courts for the discourse on rights. Minow posed the question

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[28] Conversation with Hendrick Hartog, November 14, 1986.

explicitly when she asked if conceptions of the home as the castle in popular literature are more telling statements of rights consciousness than the legal doctrines. She also asked how clients in lawsuits felt about the way lawyers framed their suits asserting rights claims. These questions, as well as others, stimulate new thinking about the Constitution. They point us to new sources for understanding American's rights consciousness. In addition, the conference's way of looking at popular constitutional consciousness was different from a gap study. The conference was not interested in comparing popular and formal legal constitutional thought. It offered the social history of popular constitutional discourse as constitutional activity itself with a life and legitimacy of its own whether or not it echoed that of the Supreme Court.

Furthermore, the conference, itself, is an example of American constitutional rights consciousness. It documented some of the history of American constitutional culture as it formed a new piece of it. By looking at the event of the conference as well as its content, we can see significant features of constitutional interpretive practice overlooked in traditional American constitutional scholarship.

CHAPTER 3.

THE COMMUNITY ON THE CONSTITUTION: EMINENT DOMAIN AND CORPORATE DISINVESTMENT

Faced with plant closings and the loss of jobs after years in the factory or mill, steelworkers in Youngstown, Ohio and Pittsburgh, Pennsylvania and toolmakers in New Bedford, Massachusetts claim their property is being taken when corporations disinvest. They believe they have a constitutional property right to participate in business decisions that affect them. Furthermore, they believe their community's power of eminent domain provides them with the mechanism with which to exercise this right. This chapter explores the political and legal practices that these ideas have generated.

Myths of Rights - Myths of Change

When Stuart Scheingold explored the politics of rights a dozen or so years ago, he suggested a standard by which to judge the efficacy of the law as an instrument for social change. In Scheingold's opinion, "If litigation can play a redistributive role, it can be useful as an agent of change. If not, its political utility must be heavily discounted."[1] He showed that litigation can generate rather than resolve social

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[1] See Stuart Scheingold, The Politics of Rights (New Haven: Yale University Press, 1974).

conflict and therefore "[t]he direct linking of rights, remedies, and change that characterizes the myth of rights must...be exchanged for a more complex framework, the politics of rights, which takes into account the contingent character of rights in the American system!"[2] The legal and political activity recounted in this chapter constitute attempts to exchange the myth of rights for the politics of rights. The myth is overcome when social activists look to the courts as means not ends and attempt to maintain their struggle as a fundamentally political rather than legal one. To do this, political strategists of movement politics must define the terms and issues of the debate rather than allow lawyers to do so. In the cases discussed here, this means that rather than seeking to have a court tell a corporation planning to relocate that it cannot move because of that court's interpretation of the Constitution, the community itself, by invoking eminent domain asserts its own sense of a constitutional right to industrial property. Eminent domain, even though a legal tool, has a popular aura to it. Courts are extremely deferential to the

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[2] See Stuart Scheingold, The Politics of Rights, p. 7.

community's definition of public use.[3] Here, then, is a legal mechanism for realizing constitutional claims that rest primarily in the community rather than with courts and judges.

My interest in studying some of these political struggles is not in predicting the ultimate outcome in building a new constitutional consensus but rather in showing where and how this political activity is taking place. In the following sections I describe campaigns based on a politics of rights that have been launched against corporate disinvestment.

Disinvestment, The Constitution, and Community Property

Corporate disinvestment, put in its crudest form, milks profits from a stable subsidiary in order to expand a conglomerate's overall holdings. The problem for the subsidiary company is that the profits syphoned off by the conglomerate are part of the capital necessary for its own upgrading and expansion. Ultimately, the subsidiary company is left with a few choices: to pressure its workers for wage concessions, to move to a cheaper labor market, or to leave the

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[3] See Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) and Berman v. Parker, 348 U.S. 28 (1954).

industry altogether and exploit the plant's real estate value. However, these are not the only reasons for closing plants.

When management first began closing plants, company spokespersons as well as analysts in the press, attributed the shutdowns to the unfair competition of foreign subsidized firms, excessive wage demands from organized labor, and unreasonable Environmental Protection Agency standards which raise costs and lower efficiency, all explanations that excused management from any responsibilities. These reasons began to ring hollow, however, as companies chose to close plants that were profitable. This has been most persuasively described by Bennett Harrison and Barry Bluestone.[4] Their economic analysis of the corporate practice of disinvestment has radicalized workers and communities.[5] In the post-New Deal socioeconomic order, there has been a consensus between management and labor that labor's wages will be dictated by profit and in return, as long as there is a profit, there will be jobs. When corporations disinvest from profitable industries, they are breaking this unwritten rule. Thus workers and

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[4] See Bennett Harrison and Barry Bluestone, The Deindustrialization of America (New York: Basic Books, 1982).

[5] See Gilda Haas, Plant Closures: Myths, Realities and Responses (Boston: South End Press, Pamphlet No. 3, 1985).

communities feel justified in attacking corporate disinvestment and consider themselves in the political mainstream when they do so. It is, nevertheless, a radical move for workers to try to have a say in owners' decisions about property. In opposing disinvestment, workers are extending the concept of property ownership to include workers' and communities' investment in industrial property as social and economic externalities. They believe this investment entitles them to participate in decisions about the ultimate fate of industrial property in their communities.

Testing the Mettle of the Steelworkers

Over the past dozen years, labor lawyer and political activist, Staunton Lynd has documented the story of steelworker locals' struggles to save jobs through a campaign against corporate disinvestment based on a politics of rights. His work is of interest both because of his argument for a community property right and because of the language and political style he uses to make his case.

While he can speak as a lawyer, scholar, political theorist, or urban planner, Lynd's target audience is ordinary people and theirs is the language he uses.

When he first wrote of this struggle in 1982, Lynd explained that

> A corporation which closes plants in several places learns from its experience. By the third or fourth closing the company acts with sophisticated precision. In each of the affected communities, however, rank and file workers are confronting a shutdown for the first time. So ... I try to even up the odds a little by telling the Youngstown story to help others.[6]

The story he tells is an old one but the analysis he brings to it and the solution he offers are new.

According to Lynd, the first step in solving a problem is to determine its root causes. When American conglomerates began shutting down plants in the Steel Belt in the late 1970's, workers at first simply accepted management's explanations that the dumping of subsidized foreign steel in American markets forced managers to close the plants. According to Lynd, this willingness of steelworkers to accept the owners' business decisions came to an end when they saw profitable plants being closed not only by diversified corporations but also by traditional steel companies.[7] At this point, union and community leaders sought other explanations, stopped blaming themselves, and developed

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[6] See Staunton Lynd, "Towards A Not-For-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property," Harvard Civil Rights-Civil Liberties Law Review 22 (1987):1.

[7] See Staunton Lynd, The Fight Against Shutdowns (San Pedro: Singlejack Books, 1982).

new strategies to hold the corporations accountable to the communities where they operated.[8] In Lynd's words, "The collapse of the steel industry in Youngstown, Pittsburgh and other communities of the industrial heartland disrupted the implicit social contract that had existed in these towns for a generation."[9] Workers were no longer willing simply to accept owners' decisions. Lynd's contribution to the struggle against plant shutdowns is to tell the Youngstown/Pittsburgh steel story in numerous forums to make the claim of a community property right meaningful in a liberal political culture which values individualism and individual property rights.[10]

The steelworkers' response to the economic disaster of closing profitable plants (albeit not profitable enough for the parent company) was not resignation to bad fortune but a deep sense of betrayal. "Inarticulate assumptions about the

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[8] See generally Gilda Haas, Plant Closures: Myths, Realities and Responses and Staunton Lynd, The Fight Against Shutdowns.

[9] See Staunton Lynd, The Fight Against Shutdowns, p. 16.

[10] American political thought was not always rooted in individualism. Jefferson's republicanism posited a rule of law that served the greater good of the community rather than the individual. For an analysis of the theoretical development that culminated in liberalism see "Notes," The Yale Law Journal 94 (1985):694-716.

connection of the companies with the communities they dominated were brought to the surface, examined and discussed. An area that had symbolized toughness and unreflective patriotism ... became the incubator of new ideas about the rights of communities to industrial property".[11] As Lynd describes it, for generations people in the steel region of Ohio and Pennsylvania had put down roots and devoted themselves, body and soul, to making steel. This meant instilling the value of unquestioning loyalty to authority; of accepting wide economic inequality and the political inequality that results; of accepting the transformation of the institutions traditionally organized to serve the individual into institutions that serve the industry -- the church, local and state governments. Perhaps, most importantly this meant raising children to want to go into the steel mill rather than to go away. The interests and demands of the industry obscured the individual's own interests. An early sociologist of American labor, Margaret F. Byington, in detailing life in the Pittsburgh steel community of Homestead at the turn of the century wrote that

> [The steel town's] men may be too worn by the stress of the twelve-hour shifts to care for their own individual development or too shorn

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[11] See Staunton Lynd, "Towards a Not-For-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property," p. 17.

> of self-dependence to exert themselves to maintain a borough government that shall give him better living conditions. 'Life, work and happiness, -- these three are bound together.' The mill offers the one, subject to no effective demand by society nor commercial necessity that the work be done under conditions which make the other two possible.[12]

These are the cultural roots of Lynd's community. Steel was an integral part of the economic life of the entire Monongahela Valley and of the neighboring communities. For generations individual and community identity was tied to the production of steel. As the national and international economy changed in the early 1970's, this economic bond came to an end.

Although the communities and workers could still earn a living from the steel industry, as Lynd explains, both old and new industry owners saw that their desire for higher marginal profitability could be pursued better in other locations and, in some cases, in other industries. Even after the owners had come to these conclusions, however, they continued to encourage the workers in these communities to order their lives around the belief that steel was there to stay. When the workers came to realize the difference between the owners' private plans and public sentiments, they felt doubly betrayed: the companies had asked for and been

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[12] See Margaret F. Byington, Homestead: The Households of a Mill Town (Pittsburgh: University of Pittsburgh Press, 1974), p. 184.

given concessions to increase profitability with the usually implicit, and sometimes explicit, promise of continued operation.

In the Pittsburgh/Youngstown area, a coalition of religious, labor and community leaders calling themselves the Tri-State Conference on Steel appealed to the workers' sense that they had been betrayed to make the concept of a community property right meaningful. Their first attempt at assessing obligations and rights in what had previously been discussed only in economic terms was to write a "pastoral letter" that, coming from the community's moral leaders not only carried extra authority, but also elevated the struggle above narrow political or economic interests. The religious leaders in the coalition were from the upper echelons of the churches. The original Ecumenical Coalition was created by a Roman Catholic Bishop, an Episcopal Bishop, and a Presbyterian minister. In their pastoral letter, they argued that

> Industrial investment decisions ought to take into account the needs and desires of employees and the community at large.... Human beings and community life are higher values than corporate profits.[13]

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[13] See Staunton Lynd, The Fight Against Shutdowns, p. 37.

This statement was the beginning of a new conception of a constitutional community property right.

A sense of betrayal does not necessarily inspire a community to pursue a constitutional claim, of course. Workers in Youngstown, in fact, first decided that there had been a breach of contract secured by an "invisible handshake." They unsuccessfully pursued this legal claim through conventional litigation.[14] In Lynd's view, however, it was their sense of betrayal that lead them to reexamine their ideas. Ultimately, they concluded that what constitutes the general welfare itself goes beyond business principles. The pastoral letter is an expression of this sentiment. In the words of the pastoral letter, "economic decisions ought not to be left to the judgment of a few persons with economic power, but should be shared with the larger community which is affected by the decisions."[15]

Steel had provided work for the community but the community had provided the atmosphere and local economy that attracted and sustained the necessary workforce as well as the infrastructure that industry needs. Communities commonly contribute externalities to lure

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[14] United Steel Workers of America, Local 1330 et al. v. United States Steel Corporation, 492 F. Supp. 1 (N.D. Ohio 1980).

[15] See Staunton Lynd, The Fight Against Shutdowns, p. 37.

industry. Sometimes the contribution is quite generous. For example, in return for picking Bethlehem, Pennsylvania for the site of its VW Rabbit auto plant, the Volkswagen Corporation was given $100 million in state and local government aid. The state would finance a $10 million rail spur and give Volkswagen a $40 million 1.75% long-term loan, while local government would settle for tax abatements which meant that Volkswagen would pay less taxes annually than it charged for a single Rabbit.[16]

The people in greater Youngstown and Pittsburgh did not expect any corporation to stay in a business that was no longer profitable. What they did expect, however, was that if the current owners of the steel plants wanted to leave the steel business, they would do so without unnecessarily wreaking havoc on the surrounding local economy. The workers and local community leaders wanted steel to sell out rather than just shut down and leave. The steel corporations, for their part, did not want to sell because they could see larger profits in selling off machinery and equipment and turning industrial plants into industrial parks. In addition, as David Roderick, Chairman of the Board of United States Steel, explained that

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[16] See Robert Lineberry, Government in America 3rd Edition (Boston Toronto: Little Brown and Co., 1986).

> We obviously would not be interested in selling the plants to a group of people that can only be successful if they were massively subsidized by the federal government. We are not, in other words, interested in creating subsidized competition for ourselves at other locations.[17]

Roderick's comment reflects management's traditionally one-sided definition of subsidies. Where direct loans to communities to keep industries from shutting down would be considered subsidies, tax abatements used to lure business to a community and the usual externalities that communities often provide are not considered subsidies.

When Lynd makes the case for industrial re-investment where the workers are, called "brownfield modernization," rather than building anew elsewhere on the assumption that the workers will follow the jobs, or "greenfield modernization," he argues that more than economic costs must be weighed. He says that

> A comparison of the costs to the company of greenfield modernization and brownfield modernization is only the first step in an adequate analysis. One must also consider social costs. Even if greenfield modernization were cheaper for the company, it might be more expensive for society as a whole.[18]

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[17] See Staunton Lynd, The Fight Against Shutdowns, p. 159.

[18] See Staunton Lynd, The Fight Against Shutdowns, p. 37.

Community property activists argue that business is obligated to consider the costs to society as part of the cost of disinvestment. This would be following the logic of the original decision to invest in a particular community. At that time, subtracted from the costs of starting up a business was the community's contribution in the form of various economic externalities. This was a kind of loan that could be paid off only with the continued operation of the plant. Should the owners want to leave, that debt must be added to the cost of leaving. Again, the debt can be paid off only by the continued operation of the plant -- if not by the original owners, then by the new, local owners. According to this theory, the original owners should not be allowed to leave without first settling all their debts -- including what they owe the community.

After coming to the understanding of the problem as Lynd describes it, the steelworkers raised new questions. The Constitution speaks to private property but also to public welfare. Do private businesses have unfettered property rights or do communities that foster businesses thereby have constitutional community property rights that can supersede business decisions to abandon them? Could the Constitution that is popularly interpreted as the protector of individual

liberties, be interpreted as the protector of community rights? Would such arguments win in court? The last is an especially difficult question since historically the courts often found that workers' rights threatened individual liberties and therefore the courts could not support workers' claims.[19] The problem, as Lynd explained it, is that "[s]ome things simply cannot be quantified. The challenge ... is to find a precise way to talk about values that cannot be measured."[20]

The Tri-State Conference on Steel responded to this challenge by promoting a new conception of a constitutional community property right. For a number of years, the Tri-State Conference on Steel had worked to show communities that their right of eminent domain already accorded them the power and the right to participate in the business decisions that affect them. They argue that communities have the right to take over businesses that can be run efficiently when conglomerates are milking them of their profits. In

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[19] See Leon Fink, "Labor, Liberty, and the Law: Trade Unionism and the Problem of American Constitutional Order," The Journal of American History 74 (1987):904-925.

[20] See Staunton Lynd, The Fight Against Shutdowns, p. 33.

turn, the community can set up a business managed by workers in the business and other members of the community.[21]

While the public interest is not popularly considered a community property right, the power of the government at all levels to protect and to promote it is recognized in the police power and the power of eminent domain.[22] In the last clause of the Fifth Amendment a limit delineates the nature of that power: "nor shall private property be taken for public use, without just compensation." Controversy about the nature of the police power has often been associated with the compensation issue. Pre-revolutionary American republicanism is said not to have seen the need for a just compensation clause in the Constitution. The republic of the Jeffersonian ideal with its spirit of civic-mindedness endorsed public takings without compensation to further the common good. This in turn furthered the purpose of government according to the Jeffersonians; leading people to an understanding of what the good was. The just compensation clause was put in the Constitution by James Madison to discourage public takings. Even he

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[21] See Mike Stout, "Eminent Domain and Bank Boycotts," 1 Labor Research Review 3 (1983):48-56.

[22] See Munn v. Illinois 94 U.S. 133; 14 L. Ed. 77 (1877).

acknowledged the American tradition that believed in furthering the common good through public takings, however. Madison envisioned the compensation clause as having a narrow legal meaning that referred only to physical takings and was intended to apply only to activities of the federal government. Early state constitutions included just compensation clauses as limits on gubernatorial power to take property. These clauses were, in time, revised to limit the state legislatures in this area. In all of these cases, however, the fundamental principle was the question of compensation not the legitimacy of takings.[23]

By 1877, the United States Supreme Court was considering a new definition of property, much broader than Madison's narrow focus on physical property. In Munn v. Illinois,[24] the Supreme Court laid the foundation for substantive due process which would come to recognize deprivations of other than physical property. While substantive due process refers to inverse condemnation rather than eminent domain, its doctrinal development has contributed to the

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[23] See Notes, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 94 The Yale Law Journal 3:694-716.

[24] 94 U.S. 133; 24 L. Ed. 77 (1877).

constitutional definition of property generally which in turn affects the doctrine of eminent domain.[25]

In both inverse condemnation and eminent domain, the taking must be for public use. What constitutes public use has come to be the heart of the debate about eminent domain. Until 1954, the Court interpreted public use to mean private property taken by the government that would then stay in the public's hands. This was most commonly the taking of land for roads, schools, parks and other clear public uses. The definition was considerably expanded in 1954 when the Court in Berman v. Parker[26] upheld Congress' condemnation of private property in the District of Columbia for urban renewal. Once the land was condemned, it was sold to private parties for development. Critics argued that the condemned property must be used directly by the public but the Court ruled that slum clearance and urban renewal constituted public use since it served the public welfare.

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[25] Inverse condemnation is distinct from eminent domain. Eminent domain involves the compulsory transfer of property to the government. In contrast, in an inverse condemnation, the government places restrictions on the use and enjoyment of the property through the police power.

[26] 348 U.S. 26 (1954).

In 1970 in Pike v. Bruce Church, Inc.,[27] the Court answered arguments that eminent domain used to promote economic welfare could interfere with interstate commerce by positing a three pronged test. First, the compensation must enable the owner to take the proceeds and use them to continue operations elsewhere. Second, the condemnation must be for a legitimate end. The Court held that sustaining the local economy and avoiding municipal bankruptcy are valid government objects. Third, the condemnation action must result in local benefits which outweigh any incidental burdens on commerce.

Like all constitutional tests, Pike raises as many issues as it resolves. Who's to say when a "local benefit" outweighs "incidental burdens" on commerce? What constitutes legitimate use? Critics of current eminent domain law contend the law fails to establish boundaries and therefore "anything goes."[28] Certainly cases are considered in court using eminent domain in new ways and unexpected places. Consequently, when the owners of the Oakland Raiders decided to relocate their National Football League franchise, the City of Oakland attempted to stop the move through eminent domain.

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[27] 397 U.S. 137 (1970).

[28] See Notes, "Public Use in Eminent Domain: Are There Limits after Oakland Raiders and Poletown?," California Western Law Review 20 (1983):82-108.

As any football fan knows, however, the former Oakland Raiders are now the Los Angeles Raiders. Oakland was barred from the use of eminent domain in this case. Courts ruled that it failed to show that the football franchise was essential to the economic health and well-being of Oakland. The California Supreme Court held, however, that owning and operating a sports franchise may be a valid public use. There is a consensus in the law literature that Oakland as well as the communities opposing plant shutdowns have been campaigning about legitimate public uses.[29]

What the limits of public use are and what constitutes a public use remain important political and legal questions. Can a municipality or state condemn property to promote economic welfare and then turn the property over to private hands? When General Motors announced plans to close its Detroit Cadillac assembly plant, Detroit was faced with the loss of thousands of jobs. General Motors agreed to stay in Detroit if a suitable site could be found for a new modern plant that required large acreage and easy access to major

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[29] See Notes, "The Origins and Original Significance of The Just Compensation Clause of the Fifth Amendment," The Yale Law Journal 94 (1985):694-716; Comments, Ohio Northern University Law Review XII (1985):231-249; Comments, Albany Law Review 49 (1984):95-130; Notes, "Public Use in Eminent Domain: Are There Limits after Oakland Raiders and Poletown?," California Western Law Review 20 (1983):82-108.

highways. Eventually, a site was found in an old, well established and tightly knit Polish neighborhood in Detroit, hardly a slum or a scene of blight. Nevertheless, the Michigan Supreme Court upheld condemning the site on the grounds that protecting a large number of jobs constituted a legitimate public use.

According to community property theorists, Detroit had a property interest in General Motors and was right in helping to relocate the plant within Detroit. While Detroit did use its power of eminent domain to take property in the hope of retaining jobs, this seizure was carried out under the traditional conception of property ownership. Detroit did not consider itself an investor in General Motors when it made the site available nor when it had provided other benefits to General Motors over the years. The claim of the community rights activists is that communities have a tangible property interest in both the economic and the social environment of their communities. Therefore, corporate decisions that damage the social fabric of a community exceed their own property rights.

Lynd's effort to talk about values that cannot be measured leads him to analyze the social impact of disinvestment on local communities and the people living there. He frequently quotes ordinary

individuals who express their dismay over the change in their communities. "You felt as if the mill would always be there." "Most people couldn't believe it. It was so huge and had operated so long and so many people depended on it for their livelihood."[30] When activists like Lynd talk to workers about a community property right, they know what he means. These words reverberate with their own sense of what the American system promises. Community, like individualism, is an American value.

Lynd makes it clear that the idea of a community property right was not the construction of ivory tower intellectuals. He writes that

> I have deliberately placed rank-and-file steelworkers in the center of the narrative. I think that they belong there. It was a steelworker ... who first talked ... about the importance of modernizing mills in existing steelmaking communities.... It was a steel worker ... [who] first proposed employee-community ownership of the mills.... It was a Pittsburgh steelworker ... who while serving as a Pennsylvania state legislator developed the idea of a "Monongahela Valley Authority" which could buy and operate steel mills that private companies no longer wish to run.[31]

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[30] See Staunton Lynd, "Towards a Not-For-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property," p. 16.

[31] See Staunton Lynd, The Fight Against Shutdowns, p. 11.

In discussing the strategy of using eminent domain to pursue community rights, Lynd argues that the steelworkers' experience is quite similar to that of those who established the Tennessee Valley Authority. When private enterprise does not want to run a needed business, the community can do it itself. "This was believed to be the rhetoric with which the Tennessee Valley Authority had been created.... Middle Americans, who would indignantly have rejected the word 'socialism' on the belief that private enterprise was intrinsically superior to public enterprise, readily accepted eminent domain as a pragmatic response to disinvestment."[32]

Lynd, a left radical, believes in local democratic control in which people understand what is happening to them and have the information and power to influence the decisions that affect them. His efforts have been directed at both those in power and those without who are living in the community. He wants to convince those in power to make an effort to stem the tide of economic crises. And he wants to educate the local community about its economic history and its politics in the hope of fostering more active and assertive democratic citizenship. The usefulness of eminent

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[32] See Staunton Lynd, "Towards a Not-For-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property," p. 25.

domain in the struggle against corporate disinvestment depends on political and economic factors rather than legal ones. There is little doubt that it is a tool available to the communities as far as the law is concerned. It remains to be seen whether communities have the will to use it.[33]

Writing on this topic several years ago, Yale Law Journal editors commented on several social and economic considerations.[34] Should communities begin to take over corporations, it might encourage managers to operate their plants less efficiently on the theory that they always had a ready buyer if times got rough. On the other hand, of course, workers may be more efficient and productive when they have a financial stake in a plant. Or might firms be unwilling to locate in the first place in communities where other plants have been condemned? Or might they be induced to relocate there thinking the community would buy them out if they wanted to leave. Of course, no firm could be sure the community would do so and could risk a great loss of trust and goodwill if it made idle threats. In any event, the use of eminent domain is a

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[33] See Comments, Ohio Northern University Law Review XII (1985):231-249.

[34] See Notes, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," The Yale Law Journal 94 (1985):694-716.

last resort. Community property rights activists would, no doubt, prefer to see firms maintain a commitment to an area on their own.

The movement in Youngstown and Pittsburgh has had little success in saving jobs. The Tri-State Conference on Steel has yet to realize the saving of any steel jobs but it has received a $600,000 grant to study the feasibility of reopening one of Pittsburgh's electrically powered steel furnaces.[35] Lynd has a broader view, however. He stresses the intellectual transformation that has occurred, noting that generations of American radicals have tried to present the idea of community ownership in a manner acceptable to their fellow citizens. Lynd believes that while the struggle has not brought to fruition a constitutional community property right itself, it has made the conception of the right meaningful. He writes that

> What the steel town communities of the Mahoning and Monongahela Valleys have witnessed in the struggle to save the mills has been a community of worker intellectuals doggedly pursuing the idea of a community right in industrial property, step by pragmatic step, arriving at proposals fully as radical as any previously suggested, yet framing them democratically, and in the American grain, in such a way as to bring others along with them.... I consider that the set of ideas that I have described constitute the splitting of an atom that has long frustrated those seeking needed

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[35] Conversation with Staunton Lynd August 26, 1987.

fundamental change in the Untied States. This is no small achievement.[36]

The steelworkers' activities have affected communities outside the Rust Belt. Workers elsewhere are learning and using the language of the community property rights movement. The Midwest Center for Labor Research has taken on the task of documenting the social cost of unemployment due to corporate disinvestment. Their purpose is to provide "[h]ard and reliable figures ... [to] help a broader range of people understand the actual social costs of corporate strategy. It helps large groups of people to coalesce and to demand a role in the decisions involving industrial development."[37] More and more organized workers are unwilling to discuss business decisions in purely economic terms. The director of the Midwest Center for Labor Research writes about "moral and legal questions" and sharpening "our sense of moral outrage." Ultimately, he concludes it is "not 'moral' to not intervene in what has been historically accepted as 'management rights.'"[38]

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[36] See Staunton Lynd, "Towards a Not-For-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property," p. 35.

[37] See Dan Swinney, "Documenting the Social Cost of Unemployment," Labor Research Review 1 (1986):49.

[38] See Dan Swinney, "Documenting the Social Cost of Unemployment," p. 56.

The labor newsletters and community development analyses of the current economic situation use the same words. The problem is corporate disinvestment. The cost is social disintegration. The solution is democratic control on the local community level. The idea is that communities have rights that are equal to those of corporations.[39] While organized labor is central in the coalition supporting a community property right, local business leaders in affected areas are also feeling the compulsion to redefine their role in the community.[40]

Eminent Domain in New Bedford

A struggle against disinvestment in the last decade that parallels the steelworkers' plight but has had greater success is that of the United Electrical Workers' Local 277 (UE Local 277) and the community of New Bedford, Massachusetts at Morse Cutting Tools. Both the size and kind of the business is different but

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[39] See especially Labor Research Review articles on plant closings in Vol. 1, Fall 1982; Vol, No 3, Summer 1983; Vol. 2, No. 1 Fall 1986 and Gilda Haas, Plant Closures: Myths, Realities and Responses.

[40] See generally Dan Swinney, "Documenting the Social Cost of Unemployment."

the nature of the problem and the response of the workers and the community is similar to that of the steelworkers.

The Morse Cutting Tool Company was a family owned and operated business from its founding in 1864 until it was taken over in 1968 by Gulf and Western. The plant was unionized in 1941 and enjoyed good labor management relations; there were only six disputes brought to arbitration and only one strike. Relations between labor and management remained friendly until 1981 when Gulf and Western decided to take on the unions in all its operations in an attempt to reduce overall labor costs and increase its return on investment.[41]

First, the union local contracted with the Industrial Cooperative Association (ICA), a Massachusetts labor research group, to do an assessment of the long term viability of Morse Cutting Tools.[42] The union then asked Massachusetts Institute of Technology economist Bennett Harrison to review the study and decide whether he thought Gulf and Western

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[41] See generally Dan Swinney, "Documenting the Social Cost of Unemployment."

[42] Industrial Cooperative Association (1982). "Investment Strategy and Morse Cutting Tool," Labor Research Review 1 (1982):18-23.

was disinvesting from Morse.[43] The analysis of both Harrison and ICA was that Gulf and Western was disinvesting from Morse and that the unions' concerns were warranted. At this point the union began to educate the New Bedford community about the problem of disinvestment and approached community leaders. It was a union and a community struggle from then on. "There were state and local political figures, members of the Chamber of Commerce, community personalities -- all with different interests and certainly not uniform in their support of militant trade unionism. But they could become part of a common front against G&W's policy of disinvestment."[44]

The cutting tool industry was in a severe recession when in August of 1983, Gulf and Western announced plans to either sell Morse or shut it down. The union, UE Local 277, and the community then geared up to find a buyer committed to maintaining the business in New Bedford. On June 4, 1984, New Bedford Mayor Brian Lawler announced the city would seize the plant through the power of eminent domain and sell it

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[43] See Bennett Harrison, "Gulf and Western -- A Model of Disinvestment," Labor Research Review 1 (1982):18-23.

[44] See Dan Swinney, "Documenting the Social Cost of Unemployment," p. 10.

to a qualified buyer. This announcement was given national attention and a buyer was found without making use of eminent domain.

The buyer, however, was under-capitalized and over-extended and, in January 1987, filed for bankruptcy. Again the workers and community were looking for a buyer who would keep the plant in New Bedford. In the end, two buyers made bids on the plant. One was a St. Louis firm that wanted only the machinery and planned to strip the plant and then exploit its real estate value. The other was a firm from Scotland that would invest in the plant and keep it running in New Bedford.

With the decision solely in the hands of the bankruptcy judge, the community nevertheless redoubled its efforts to keep the plant open in New Bedford. The union contacted everyone it could in St. Louis to pressure that buyer to withdraw its bid, even taking out a full page ad in the St. Louis Post Dispatch. The ad was signed by 30 community leaders ranging from the mayor of New Bedford to its U.S. representative to the president of the Whaling City Youth Baseball League.[45]

Neither buyer backed out, and the St. Louis firm estimated its bid at a million dollars more than that of the Scotish firm. The bankruptcy judge, however,

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[45] UE News, July 20, 1987, p. 6-7.

estimated the difference as only about $100,000. Even though the St. Louis bid was still larger, the judge decided that the fate of 300 jobs tipped the scales in favor of the buyer who would maintain the company in the community.

The case of Morse Cutting Tools is significant because it shows the viability of the concept of a constitutional community property right. At one point the city was willing to incur the expense of condemnation proceedings and ultimately a federal bankruptcy judge counted jobs and what they meant to the community as more valuable than money in weighing the two offers. The judge did not ignore the claims of the Morse creditors but neither did he ignore the claims of the community.

Unlike this bankruptcy judge, the federal judge in the Youngstown breach of promise case had not been able to find a basis in law for the community property right claim. Even in that case, however, the judge saw some justice in the claim. He said that

> United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years. Unfortunately, the mechanism to reach the ideal settlement, to

> recognize this new property right, is not now in existence in the code of laws of our nation.[46]

Notice that the judge says a mechanism to recognize a community property right is "not now" in our code of laws. This is significantly different from saying this idea and the Constitution are mutually exclusive. Clearly, like the communities which pursued the claim, this judge could make "sense" out of the claim, even if he could not yet make "law" out of it.[47]

Conclusion

Enough towns have considered using eminent domain to maintain local economies that its significance should not be dismissed lightly.[48] In addition, the United States Congress and eighteen states have enacted legislation to restrict in some measure the free flow of capital out of their borders. These bills have ranged from requiring only 30 to 60 days notice of a

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[46] United Steel Workers of American, Local 1330 et al. v. United States Steel Corporation, 492 F. Supp. 1 (N.D. Ohio 1980).

[47] For a legal argument in support of Local 1330's suit, see Daniel A. Farber and John H. Matheson, "Beyond Promissory Estoppel: Contract Law and the `Invisible Handshake,'" The University of Chicago Law Review 52 (1985):4.

[48] See Mike Stout, "Eminent Domain and Bank Boycotts," Labor Research Review 1 (1983):48-56.

shutdown, to severance pay and fringe benefits for one year. Most states require one year's notification of intent to close. About three-quarters require some sort of severance payment.[49] This activity suggests that the view of what the Constitution promises is changing and as such merits our attention.

Scheingold argues that a transformation of culture is required for fundamental change. He has reservations about the political relevance of legal or constitutional rights strategies because he asserts a rights strategy is unlikely to be socially transformative. Rights strategies fail as agents of change because they give a false sense of what the problem and the solution are -- the myth of rights problem. In addition, and more fatal to the chance for change, legal ideology undermines a vision of a more communal social order. In the end, Scheingold stops short of repudiating the politics of rights, however. He looks "with ambivalent favor on approaches to change that keep us in touch with liberal democratic values....In this context, the politics of rights can be recommended because it is linked to the ethic of

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[49] See Richard B. McKenzie, Fugitive Industries (Cambridge: Ballinger Publishing Co., 1984).

rights but it is not caught up in the sterile dogmatism of the myth of rights."[50]

When communities use the power of eminent domain to protect the communities' interests, they have adopted a new approach to the politics of rights. It is structurally different from conventional rights litigation and, therefore, may be useful as an agent of change. Eminent domain is based on the idea of community rather than individual interests. It is exercised by groups of people responding to socioeconomic or political, rather than legal, considerations. Eminent domain, then, is compatible with the communal vision that Scheingold finds necessary for a fundamental change in our political culture. Communities like Youngstown and Pittsburgh, New Bedford, Detroit, and Oakland appear to have a sense of this communal vision.

Just as using the power of eminent domain makes a politics of rights strategy different from other campaigns, Staunton Lynd's point of view encourages people to take a somewhat different view of the law. He uses the law as leverage -- it is not the end itself. He is attuned to the wider non-legal politics

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[50] See Stuart Scheingold, The Politics of Rights (New Haven: Yale University Press, 1974).

in the whole struggle and shares Scheingold's view of the law. Lynd says that

> The negative side of a law suit is that it takes the action out of the hands of workers, and tends to make them passive spectators.... [T]he very existence of lawyers and courts encourages people to believe that "if only we get into court" things will, somehow, turn out differently. This faith is misplaced.[51]

In evaluating the efficacy of legal tactics to save jobs, Lynd concludes that

> Legal activity can be very useful when it is one part of a larger struggle, but should not be relied on alone. The heart of resistance to a shutdown must be the struggle of workers, not of lawyers.[52]

Lynd does not focus on judicial legitimation of worker and community claims. As blacks and their allies have sadly learned, custom and culture controls our social practices in ways that courts cannot even begin to touch on their own. Consequently, Lynd wants people to conceive of a community property right and to take politics into their own hands democratically so that they themselves come to their own understanding of what the Constitution protects and promotes. He is tapping the American legal culture to transform it, not simply to add one more right to individuals' legal or constitutional arsenals.

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[51] See Staunton Lynd, The Fight Against Shutdowns, p. 188.

[52] See Staunton Lynd, The Fight Against Shutdowns, p. 189.

The political practices explored in this chapter generated a new conception of a constitutional right and posited a new arena for an old legal struggle -- the community instead of the courtroom. Unlike traditional political rights struggles, the community property right movement does not look to the Supreme Court for affirmation of its claim or characterize policy problems in simple "rights and remedies" fashion. Consequently, while the movement is a politics of rights, it is not rooted in the legal ideology that fosters the myth of rights. The movement is predicated on replacing the present culture of individual competition and reward with a more communal social order using the tactics of grassroots democratic action educating the public on the issues and building consensus around shared values. The community property movement has conceived of a redistributive role for litigation through the community's power of eminent domain and has thereby expanded the possibility that a politics of rights can be an agent of change.

CHAPTER 4.

CONGRESS ON THE CONSTITUTION: THE CONSTITUTIONAL LAW FIRMS FOR THE HOUSE AND SENATE

A significant part of Congress' constitutional interpretive practice comes from the important but little known offices of legal counsel that Congress established in the last decade to defend and protect its institutional interests before the Supreme Court. These offices operate as Congress' "constitutional law firms." They are the Office of the Senate Legal Counsel and the Office of the Counsel to the Clerk. These offices are small with only one client, but that client is the Congress of the United States.

Introduction

The work of these law offices and its relationship to how Congress handles constitutional questions came to my attention as part of the answer to a question U.S. Circuit Judge Abner J. Mikva raised in a 1983 North Carolina Law Review article in which he asked: "How Well Does Congress Support and Defend the Constitution?"[1] This question must be posed against a prior question, however. How does Congress support and defend the Constitution? Certainly, as a legislature,

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[1] See Abner J. Mikva, "How Well Does Congress Support and Defend the Constitution?" The North Carolina Law Review 61 (1983):587.

it does this differently from a court and the activity may not present itself directly as constitutional interpretive practice. Therefore we should understand Congress' view of the Constitution not just by what it says about the document but also by what actions Congress takes - actions it believes to be constitutional.

Congress can pursue constitutional meaning down four main avenues. Its influence is felt when it approves court appointments. It can respond to Court interpretations by rewriting statutes weaving around specific Court objections and it frequently does this. For example, Congress passed the Keating-Owen Act in 1916 which was to protect child labor but the Court declared it unconstitutional in Hammer v. Dagenhart.[2] Between 1918 and 1938, Congress made various attempts at protective labor legislation. Finally in 1938, Congress passed the Fair Labor Standards Act which was a comprehensive protective labor law including protection for child labor. Subsequently, the Court upheld this legislation in United States v. Darby.[3] More recently, Congress has thwarted, in part, Roe v.

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[2] 247 U.S. 251 (1918).

[3] 312 U.S. 100 (1941).

Wade,[4] legalizing abortion by passing the commonly called "Hyde Amendment" which prohibits medicaid funding for abortions.

Congress can also initiate constitutional amendments to overturn Court decisions. This is, of course, the roughest and least traveled path.[5] Or, Congress can show its differences with Court judgments by attempting to remove certain subject areas from the Court's jurisdiction with what are commonly called "court-curbing" bills. The one court-curbing bill ever passed by Congress was in the Reconstruction period. As part of the Reconstruction Acts, Congress enacted the Habeas Corpus Act of 1867. The intent of the law was to prevent the harassment of freed slaves but its first use was by William H. McCardle, a racist editor of the Vicksburg (Mississippi) Times who had been arrested by the military for publishing an article critical of Reconstruction. McCardle lost the case and appealed to the Supreme Court. In order to forestall the Court's ruling in this case, Congress enacted legislation in 1868 which repealed the Court's appellate jurisdiction in all cases arising under the

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[4] 410 U.S. 113 (1973).

[5] The Eleventh Amendment was passed to overturn Chisholm v. Georgia, 1 Dallas 419 (1793). The Sixteenth Amendment was passed to overturn Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895).

Habeas Corpus Act of 1867.[6] While this is the only time Congress has actually changed the Court's jurisdiction, even its possibility rouses immediate dire warnings from the scholarly community where there is no consensus as to whether or not these bills are constitutional.[7]

A fifth avenue has opened up in the last decade that does not have some of the political and institutional problems of the other three -- the use of Congress' constitutional law offices to cull and articulate Congress' constitutional thought. These offices were established in response to a change over time in the Executive's interpretation of the Faithfully Execute Clause. Beginning in 1926, presidents have declined to defend acts of Congress before the Supreme Court in some cases.[8] More recently, President Jimmy Carter's attorney general declined in 1980 to defend the constitutionality of the Public Broadcasting Corporation Act but upon change of administrations, Ronald Reagan's attorney general

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[6] See Sheldon Goldman, Constitutional Law: Cases and Essays (New York: Harper and Row, 1987).

[7] See Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," Stanford Law Review 36 (1984):895.

[8] See Myers v. United States, 272 U.S. 52 (1926) and Humphrey's Executor v. United States, 295 U.S. 602 (1935).

decided to defend the act. While every act of Congress must be defended before the Court, it is no longer always the case that it is the Solicitor General who does so. Now Congress has its own lawyers who are accountable directly to, and only to, Congress. And, unlike the Solicitor General, their loyalty is not divided between two branches.

Both court-curbing bills and the work of these law offices enable Congress to directly influence constitutional interpretation. Court-curbing legislation, however, does so negatively. By simply silencing the Court, it would leave us with neither Court nor Congressional constitutional reasoning. Through its constitutional law offices Congress can, instead, focus its own constitutional thought and then join the debate.

The threat of court-curbing legislation prompted U.S. Circuit Judge and former Congressman Abner J. Mikva to assert some years ago that Congress was incapable of adequately interpreting the Constitution for itself. Mikva argued that far from being curbed, the Supreme Court should have the final say.[9] He was quickly joined in this debate by Congressional Research Service Specialist Louis Fisher who made the

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[9] See Abner M. Mikva, "How Well Does Congress Support and Defend the Constitution?," p. 611.

case for both a capacity and an interest in constitutional interpretation by Congress. Fisher believes that constitutional interpretation is misunderstood when framed in terms of "final say" and should, instead, be understood as a matter of "participating in a dialogue" on the Constitution.[10] This dialogue should not be understood as only between the Court and Congress, however. There is dialogue within Congress on the Constitution which the law offices cull. It is this discussion that is captured in the briefs.

In this chapter I explore these two most direct and deliberate mechanisms for congressional influence on constitutional meaning, court-curbing legislation and the work of Congress' constitutional law offices. I argue that Congress would fail to fulfill its constitutional role were it simply to defer to the Court without considering for itself the constitutionality of its acts. While I believe that court-curbing legislation is constitutional, I agree with its critics that its use is dysfunctional for the constitutional system since it squelches rather than fosters discourse. Consequently, Congress' constitutional law offices offer the more viable

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[10] Fisher, "Constitutional Interpretation by Members of Congress," North Carolina Law Review 63 (1985):707.

mechanism through which Congress can fulfill its mission as a co-equal voice of the Constitution.

Court Curbing Legislation

There has yet to be a consensus on the extent of Congress' power to change or remove federal judicial review authority and while only once in the nation's history has Congress succeeded in passing a court-curbing bill, court-curbing bills should be understood as part of Congress' constitutional interpretative practice. Arguably, they have an influence on the Court even without their passage.[11] These bills surface in Congress at moments of greatest dissatisfaction with specific court decisions. The Butler-Jenner Bill[12] of 1958, for example, was an attempt to remove from federal appellate authority cases concerning five subject areas in which the Court had recently handed down controversial decisions. Were this bill passed, it would have deprived the Court of appellate jurisdiction in all cases of: contempt

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[11] See generally Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate." See also Leslie Friedman Goldstein, "The ERA and the U.S. Supreme Court," Research in Law and Policy Studies, 1 (1987):145-161.

[12] S. 2646, 85th Cong., 1st Sess. (1957).

proceedings against witnesses before congressional committees, dismissal of government employees on security grounds, state laws for the control of subversive activities, regulations relating to subversive activities of public school teachers, and state requirements for admission to the practice of law. The bill did not pass and was attacked as an unconstitutional exercise of Congressional power. Its critics argued that since it precluded Supreme Court review in every case involving a particular subject, it was an unconstitutional encroachment on the Court's essential functions.

Court-curbing bills entered a period of quiescence until the first Reagan Administration. Again, in response to specific Court judgments, members of Congress submitted over thirty jurisdiction-stripping bills. Dissatisfaction stemmed mainly from Court decisions dealing with the controversial issues of school prayer, abortion and busing.[13]

Congress' power to determine the appellate authority of the federal courts is established in Article III Section 2 of the Constitution. The Constitution gives the Court appellate jurisdiction "with such exceptions, and under such Regulations as

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[13] See Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," p. 895.

Congress shall make" over all cases within the judicial power of the United States originating in state or lower federal courts. What this means in regard to Congress' power and, further, what it would mean for the constitutional system were the power exercised, have been the subjects of much scholarly debate in the last thirty years.

In 1960, Leonard G. Ratner argued Congress does not have the power to withdraw jurisdiction in specified subject areas. This, according to him, would encroach on "essential functions" of the Supreme Court. Ratner defined the "essential functions" of the Court as providing a uniform and consistent national law. In Ratner's estimate, an interpretation of Article III, Section 2 that gave Congress plenary control over the appellate jurisdiction of the Supreme Court would mean that "[it] can all but destroy the coordinate judicial branch and thus upset the delicately poised constitutional system of checks and balances."[14]

Ratner is not alone in his fears for the constitutional system were Congress to have authority over the Court such that it or others by default became the ultimate authority on the Constitution. This is what Mikva fears. But Ratner's "essential functions"

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[14] See Leonard G. Ratner, "Congressional Power Over the Appellate Jurisdiction of the Supreme Court," University of Pennsylvania Law Review 109 (1960):158.

argument has failed to persuade recent scholars. Martin H. Redish rejects the "essential functions" argument and looks instead to the Fourteenth Amendment for a constitutional limit on Congress' power. Redish argues, "...Congress cannot employ its article III powers to regulate federal jurisdiction in a manner that violates another constitutional provision, and ... [since] the due process clause requires the availability of a forum that is formally independent of the body alleged to have violated constitutional rights...," state supreme courts would be unavailable in some cases and thus the Supreme Court is needed for appellate review.[15] This argument is a variation on that of Lawrence Sager who argues that there are limits on Congress' Article III powers because there must be a federal forum for constitutional claims. Like Ratner, these scholars are struggling to locate the constitutional bar to Congress' removing Supreme Court jurisdiction in specified cases.

The reason no one has found a satisfactory argument against Congress' plenary control in this area may be because the Constitution does in fact give this wide discretionary power to Congress. This is Gerald

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[15] See Martin H. Redish, "Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager," Northwestern University Law Review 77 (1982):163.

Gunther's reading of Article III. Gunther is quite a bit more sanguine than Ratner and Mikva about what this means for the system as a whole. He, like they, believes Congress should not exercise this power and he takes comfort in the fact that only once has it done so. Gunther, however, recalls the debates in the Constitutional Convention that culminated in the compromise that Article III expresses[16] and notes that the early thought was to depend upon state courts for the adjudication of constitutional claims. Further, the Framers, according to Gunther, believed Congress should make the determinations as to when a state rather than a federal court should answer constitutional questions.

In a real sense then, Congress's judgment, perhaps coming through the back door of a state court, was meant to supercede that of the Supreme Court in some constitutional areas. In fact, in all areas not falling within the Court's original jurisdiction. This view has its supporters and they include the Supreme Court.[17] What is, of course, most notable about this view is that it is Congress which has been most unwilling to exercise the power. When presented with

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[16] See Gerald Gunther, "Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate," p. 912.

[17] See Ex Parte McCardle, 7 Wallace 506 (1869).

court-curbing bills, Congress has deferred to the Court as the ultimate constitutional authority. From Ratner to Gunther to Mikva, the consensus is that this is as it should be. Mikva's arguments, however, are not constitutional ones. Rather, they are of the most practical kind. Congress, says Mikva, just is not good at interpreting the Constitution.

Mikva v. Fisher

Abner J. Mikva, as a sitting federal judge and former U.S congressman from Illinois, is in a position to speak to both constitutional interpretation and congress' capacity for it. Mikva's judgment is that "[for] the most part, legislative debate does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts."[18] Consequently, Mikva suggests that Congress uphold its oath of office and filter out the clearly unconstitutional but "the courts should examine to the fullest extent the constitutional implications of every piece of legislation."[19] Mikva offers this extreme

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[18] See Abner J. Mikva, "How Well Does Congress Support and Defend the Constitution?", p. 587.

[19] See Abner J. Mikva, "How Well Does Congress Support and Defend the Constitution?", p. 590.

solution to the problem of Congress' supposed incapacity in this area without elaboration. Does he really mean <u>every</u> piece of legislation? Is Congress' understanding of constitutionality so little to be depended upon? On the basis of his experience, apparently epitomized by the three examples he offers, Mikva concludes that

> Congress...has not been a model of constitutional decision making....Its hallmark has been superficial and, for the most part, self-serving constitutional debate .....While congressional constitutional debate aids the courts by identifying issues and motivations, it is not a substitute for the judgment of the courts. The courts must play their unique apolitical role and make the hard decisions....Members of Congress should strive to be Jefferson's independent guardians but should remember that the system was designed to give the courts the final say.[20]

Not surprisingly, Fisher does not agree with Mikva's analysis. He avoids the deeper pitfalls of Mikva's argument by reshaping the issue. Mikva concerns himself with who should have the "final say." Without defining final, he asserts that the Court should have it. Fisher, wisely, speaks instead in terms of "contributions to constitutional meaning" and participation by Congress in "constitutional

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[20] See Abner J. Mikva, "How Well Does Congress Support and Defend the Constitution?", p. 610-11.

dialogue."[21] He says, "Despite institutional and political limitations shared with the President and the courts,... Congress can perform an essential, broad, and ongoing role in shaping the meaning of the Constitution."[22]

This is not a new role for Congress. Fisher recalls that historically, both the congress and the executive has been instrumental in determining constitutional meaning. Fisher offers a brief but telling review of the doctrine of "coordinate construction" to "demonstrate that Congress, by the very nature of the political system, shares with the executive and the judiciary the duty of constitutional interpretation."[23] Jefferson, Jackson, and Lincoln all asserted executive constitutional interpretation power to some degree. Fisher, looking at the example of the removal power shows that Congress' interpretations have greatly shaped the Court's judgment.[24]

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[21] See Louis Fisher, "Constitutional Interpretation by Members of Congress," North Carolina Law Review 63 (1985):707.

[22] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 708.

[23] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 710-11.

[24] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 716.

Fisher's point is not to set Congress or the Executive above the Court in constitutional interpretation but rather to show that "final" is not an operative word in this arena. "[Comments] by Jefferson, Jackson, Lincoln, Taney, and Frankfurter demonstrate that the Supreme Court is the 'ultimate interpreter' only when its decisions have been accepted as reasonable and persuasive by the people and other governmental units."[25]

One of those governmental units, Congress, for example, continues to be unpersuaded by the Court's reasoning on the legislative veto. According to Fisher, within the first sixteen months following the Court's decision to strike them down, Congress enacted eighteen bills incorporating fifty-three legislation vetoes.[26] It is hard to see finality in this.

Fisher does not look for finality from either the Court or Congress. He characterizes the issue as

> not simply one of measuring the competence of Congress against an ideal standard, but of comparing legislative to judicial competence. Because both branches have their strengths and their weaknesses, an open dialogue between Congress and the Courts is a more fruitful avenue for constitutional

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[25] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 740.

[26] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 725.

> interpretation than simply believing that the judiciary possesses certain superior skills.[27]

Reminding us that members of Congress take an oath of office to defend and support the Constitution and therefore cannot ignore the constitutional issue when they legislate, Fisher defends the authority and competence of Congress in the realm of Constitutional interpretation. A particular strength of Congress is fact-finding and under the doctrine of presumption of constitutionality,[28] the Court depends on Congress for this. "When the judiciary determines that legislators have chosen a 'rational basis' for

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[27] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 722. Footnote omitted.

[28] The doctrine of presumption of constitutionality was respected more in its breach than in its observance during the Lochner Era, the heyday of the Court's use of substantive due process doctrine. Under substantive due process doctrine, the Court was presuming legislation to be unconstitutional and requiring that it pass often impossible "constitutional tests." As the Court's authority began to erode because of this activism against New Deal legislation, it took the institutionally protective course of deferring to Congress' view of constitutionality by not questioning legislation except in certain cases. The Court continues to apply "strict scrutiny" in cases where legislation on its face infringes the Bill of Rights, where the open political processes are impeded and where legislation affects "discrete and insular minorities."

carrying out the commerce power, for example, the Court's investigation ceases."[29]

Mikva claims the structure of Congress is such that it cannot make constitutional determinations. Fisher, however, finds that there are numerous institutional mechanisms that enable Congress to participate in constitutional interpretive practice. He says that

> Congressional hearings attract testimony from administration witnesses, constitutional scholars, and representatives of various private organizations. Committee staff can analyze constitutional questions and call on the American Law Division of the Library of Congress, which is staffed with approximately fifty attorneys specializing in different subject areas. The office of the Legislative Counsel of the House and the Office of the Legislative Counsel of the Senate, established to assist members in drafting bills and resolutions, also provide constitutional advice.[30]

Members of Congress do not stop at Congress' doors, however, when it comes to pushing their views of constitutionality. Fisher calls it a "striking development" that over the past decade more and more members have turned to the courts for assistance.[31]

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[29] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 730.

30 See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 730.

[31] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 731.

These cases carry with them political questions and standing to sue problems, however. Legislators must meet all the standing requirements of any other litigant but also must show that they do not suffer from an injury that can be "redressed by their colleagues acting through the regular legislative process...."[32]

The political question and standing to sue problem does not enter another whole group of cases, however. Because these are those in which Congress as an institution pursues a case to the Supreme Court. Congress' interest in any case that questions the constitutionality of its legislation is clear, it always has standing to sue.[33] Since the whole Congress and not just members of it are bringing suit, the redress to colleagues problem is resolved and only constitutional questions remain in these cases. In these instances, Congress calls in its own constitutional law offices.

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[32] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 730-31.

[33] See R. Lawrence Dessem, "Congressional Standing to Sue: Whose Vote is This, Anyway?" Notre Dame Law Review 62 (1986):1.

Constitutional Law Offices

Traditionally, the Justice Department has been Congress' constitutional law firm. It was the job of the Solicitor General to defend the constitutionality of legislation before the Supreme Court. This practice began to change when the executive in 1926 asserted that there are two circumstances under which the Attorney General can decline to defend a statute. In one case the President is not required to defend statutes that, in his opinion, unconstitutionally encroach on the authority or powers of the president. In the other case, the president is not required to defend statutes that are clearly unconstitutional. The case law undergirding these assertions is Myers v. United States and Humphrey's Executor v. United States.[34] In Myers, the power of the President to remove subordinates without interference was at issue. Here the Solicitor General argued for the first time that an act of Congress was unconstitutional. The Court agreed that the act in question improperly eroded the President's authority. In Humphrey's Executor, the Solicitor General argued that the Federal Trade Commission Act was unconstitutional if construed to limit the President's removal power. The Court

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[34] 272 U.S. 52 (1926) and 295 U.S. 602 (1935) respectively.

disagreed and held the act's restriction was permissible.[35] It was this changed practice of the Solicitor General of sometimes attacking rather than automatically defending federal statutes that prompted Congress to establish its own constitutional law offices in 1978. Why Congress waited so long is an open question.

The issues that the executive has chosen to attack rather than defend have been anything but trivial. In INS v. CHADHA,[36] the legislative veto was attacked. In this case, the Court declared the legislative veto unconstitutional. The legislative veto was constructed fifty years ago as an administrative efficiency measure to expedite New Deal legislation in response to the Depression. It gave some "quasi-legislative" power to the executive but retained an ultimate one or two-house veto over decisions made thereunder.

In the last decade, Congress has concluded that it is essential that it have its own legal counsel to see

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[35] See Editors Notes, "Equitable Discretion and the Congressional Defense of Statutes," Yale Law Journal 92 (1983):970.

[36] INS v. Chadha, 462 U.S. 919 (1983). In this case, the Court declared the legislative veto unconstitutional. The legislative veto was constructed fifty years ago as an administrative efficiency measure to expedite New Deal legislation in response to the Depression. It gave some "quasi-legislative" power to the executive but retained an ultimate one or two-house veto over decisions made thereunder.

to it that its statutes are always vigorously defended before the Court. Surprisingly little scholarly attention has been focused on this change in the relationship between the executive and legislative departments nor the subsequent use of the congressional law offices to correct the imbalance.[37] Even within Congress, only recently have members learned of the existence of the offices and understood their responsibilities. Since part of the law offices' responsibilities is defending members with legal problems, the members often hear about the law offices the hard way, however.[38]

The two offices, while having virtually the same structure and responsibilities, blossomed from different seeds. The Office of the Senate Legal Counsel was statutorily created by the "Ethics in

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[37] See generally Louis Fisher, "Constitutional Interpretation by Members of Congress," R. Lawrence Dessem, "Congressional Standing to Sue: Whose Vote is This, Any?" and Editors Notes, "Equitable Discretion and the Congressional Defense of Statutes."

[38] Interview with Michael Travaglini of the Office of the Counsel to the Clerk on August 8, 1988. I conducted telephone interviews on April 19 and 20 and August 3 and 8, 1988 with members of both the House and Senate offices. Morgan Frankle, Assistant Counsel, of the Office of the Senate Legal Counsel and Michael Travaglini were especially generous with their time and help. They both provided briefs, answered questions themselves and sought answers from others where necessary to provide the history and current picture of these two offices.

Government Act of 1978".[39] At this same time, there was a bill to create a joint House-Senate Office of Congressional Legal Counsel but the appropriate House committees did not consider the bill. Because the House was not prepared to agree to the creation of the joint office, the bill was later amended to create only the Office of Senate Legal Counsel.[40] The Office of the Counsel to the Clerk which performs the same duties for the House has evolved over the past decade through a series of personnel decisions.[41]

The Office of the Senate Legal Counsel acts in the Senate's name only when directed to do so by a resolution of the Senate and consequently is clearly the voice of the Senate when it argues before the Supreme Court. The office is directly accountable to the Joint Leadership Group which consists of the President pro tempore of the Senate, majority and minority leaders of the Senate, chair and ranking minority members on the Committee of the Judiciary of the Senate and the chair and ranking minority member of

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[39] "Ethics in Government Act of 1978" - Public Law 95-521 [S. 555]; October 26, 1978. The Office of the Senate Legal Counsel was codified at 2 U.S.C. Sect. 288 (1982).

[40] See Footnote 3 in Editor's notes Yale Law Journal p. 973.

[41] Interview with Michael Travaglini April 19, 1988.

the committee of the Senate which has jurisdiction over the contingency funds of the Senate.

The chartering statute for the office requires that, "[in] performing any function under this chapter, the Counsel shall defend vigorously..." the constitutionality of acts of Congress.[42] Unlike the other sections of this law, Congress here uses the words "shall defend vigorously" in relation to the defense of the constitutionality of acts of Congress. It is clear that Congress was determined to have in place its own effective mechanism for its participation in constitutional debate with the Supreme Court.

The Office of the Senate Legal Counsel consists of the Counsel, a Deputy Counsel and Assistant Counsels. The position of Counsel has been filled by only one person in its brief history. This Counsel came to the office from tours as the Chief Staff Attorney for the D.C. Circuit and as counsel to the NAACP Legal Defense Fund. There have been three deputy counsels - one from Capitol Hill, one from an executive agency and one from a trade association and work on Capital Hill. One of the current two assistant counsels was a judicial clerk. Others have come from the Department of Justice and private practice. An assistant counsel commented, however, that while only two have come from private

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[42] 2 U.S.C. Sect. 288 (1982) at 584.

practice, they all could have because the work is essentially that of a private law firm.[43]

Because this office speaks for the Congress as a whole when it defends the constitutionality of legislation, it does not make recommendations about legislation. As noted earlier, there are numerous attorneys available to Congress for that purpose. The appointments to the office are nonpolitical as well. The Counsel and Deputy Counsel are appointed by the president pro tempore of the senate from among recommendations submitted by the senate majority and minority leaders. The law commands that the appointments be made solely on the basis of merit.[44] The Counsel and Deputy Counsel are appointed for a term that expires at the end of the congress within which they are appointed but they may be reappointed. Since there has been only one Counsel in the life of the office and the senate has been in the hands of both the Democrats and the Republicans in that time, it is fair to say the nonpartisan nature of the office has been respected.

Because the Counsel to the Clerk has been established by a series of decisions made by the Bi-Partisan Group of the House rather than by statute, the

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[43] Interview with Morgan Frankle August 3, 1988.

[44] 2 U.S.C. Sect. 288 (1982) at 575.

office has slightly less official standing. Its history and the background of its Counsel, Deputies and Assistants parallels that of its senate counterpart, however. There have been two Counsels to the Clerk in its short life but the current Counsel has held the position almost since the inception of the office and rose to the post from the position of Deputy Counsel. The current House Counsel came to the office from other work on Capitol Hill. The Deputy Counsel had three years experience as an assistant Senate Legal Counsel before joining the House office. There are two Assistant House Counsels whose backgrounds vary between experience at the Justice Department and as clerks for the D.C. Circuit. (Interestingly, one of the clerkships was with Abner J. Mikva.) The House office also has a law clerk who began in the office as a paralegal before entering law school. The work and the structure of the office is that of most law firms. The difference is that the sole client of these offices is the Congress of the United States.

This client has recently employed these two offices to defend challenged legislation before the Supreme Court in three landmark cases: INS V. CHADHA,[45] BOWSHER V. SYNAR,[46] and MORRISON V. OLSON[47]

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[45] 462 U.S. 919 (1983).

[46] 106 S.Ct. 3181 (1986).

-- the legislative veto, the balanced budget bill and the independent counsel cases respectively. In Bowsher, Representative Michael Synar of Oklahoma challenged the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985 immediately upon its passage. The act called for an automatic budget-cutting scheme that would be administered by the Comptroller General. Synar charged that because the Comptroller General is ultimately removable by Congress, he/she could not play what amounts to an executive agency role since it would breech separation of powers principles. In Morrison, the establishment of the Office of Independent Counsel was challenged. The felt need for the independence of these counsels arose in the aftermath of Watergate. The special prosecutor in that case, Archibald Cox, was appointed by the Attorney General and therefore accountable to him. Ultimately, Cox was not fully free to carry his investigation as far as he felt it should go and was fired. The independence of his successor was guaranteed only by the word of the President. Congress established in this act a statutory foundation for the independence of independent counsels.

Are these laws constitutional? Congress says yes. The legal briefs in these three cases provide the

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[47] 108 S. Ct. 2597 (1987).

record of Congress' interpretation of the Constitution with regard to separation of powers and delegation of authority doctrines, the Appointments Clause, The Necessary and Proper Clause, and the Faithfully Execute Clause. The Supreme Court has agreed only once with Congress' interpretation in these cases, but that is not what is noteworthy here. Our attention should be on these briefs as the outcome of Congress' participation in Fisher's "constitutional dialogue." I turn now to Congress' discourse on the Constitution revealed in these three cases.

Congressional Constitutional Discourse

CHADHA presented the first constitutional case of major proportions presented to the House and Senate law offices. Like the instances cited above, this was another case of refusal by the Attorney General to defend the constitutionality of an act of Congress. The case, ostensibly about the fate of a deportable alien, more importantly questioned the constitutionality of the legislative veto. In his dissenting opinion, Justice White called the case one of "surpassing importance" because declaring the legislative veto unconstitutional "sounds the death

knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto'."[48]

Clearly, a very important case to be handed to two small law offices. The House Counsel did in this case employ an additional attorney in the person of Eugene Gressman of the University of North Carolina School of Law but the Office of Senate Legal Counsel handled its brief entirely in office. When it came time for oral argument before the Supreme Court, the Senate Legal Counsel, Michael Davidson, took the entire time for both offices since the statutory basis of the Senate office was felt to give more authority to his position. This practice was also followed for the same reason in the case of the independent counsel, Morrison v. Olson discussed subsequently.[49]

The Senate Legal Counsel and the Counsel to the Clerk comprise the voice of the Congress before the Supreme Court. When a case is underway on the Senate side, members of the Joint Leadership Group are kept apprised of the arguments and have opportunity for input into them although the greatest contribution is

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[48] INS v. Chadha, 462 U.S. 919 (1983) at 967.

[49] Asked if there is any thought in the House of giving statutory authority to the Counsel to the Clerk as the House's voice at the Supreme Court, Michael Travaglini responded that the Bi-Partisan Group is satisfied with the current status and process. Interview August 8, 1988.

made by the attorneys in the office.[50] On the House side, weekly meetings occur to keep the Bi-Partisan Group informed and in a position to give input as well. In some cases (most recently the independent counsel case), members of the minority party will withdraw support for a posited legal argument and ask that their names be removed from the brief if the argument is pursued.[51] However, it is still fair to say that these briefs represent Congress' interpretation of the Constitution in the same sense that non-unanimous legislation is Congress' policy choice.

Congress' interpretation of its powers under the Necessary and Proper Clause and its interpretation of the separation of powers and delegation of authority doctrines are in the House and Senate party briefs filed in CHADHA. At issue in this case is the question as to whether the legislative veto is a constitutional means of implementing the power of Congress over the admission of aliens. Both the Immigration and Naturalization Service and Jagdish Rai Chadha, the deportable alien, argued that this use of the legislative veto unconstitutionally infringed the

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[50] Interview with Morgan Frankle, August 3, 1987.

[51] In the independent counsel case, The Speaker and Leadership Group consisted of The Honorable Jim Wright, Speaker of the House of Representatives; The Honorable Thomas S. Foley, Majority Leader; and The Honorable Tony Coelho, Majority Whip.

constitutional powers of the executive. Section 244 of the Immigration and Nationality Act of 1952 provides for a sharing of some of the authority over deportable aliens but ultimate authority stays in Congress. Does the Constitution allow this? Congress says yes.

In its Senate brief, Congress argues that the Presentation and Bicameralism Clauses do not apply in this case because they are fully satisfied by the underlying statute authorizing legislative review.[52] Congress strongly objected to the Supreme Court's considering the constitutionality of a "generic" legislative veto and urged that the Court limit its opinion to the use of the legislative veto in the circumstances of the instant case. Consequently, the Senate brief concentrates its argument on the constitutionality of the legislative veto in regard to deportable aliens only. Calling on precedent, the brief argues that the legislative veto should be judged by the test set out in Nixon v. Administrator of General Services[53] and that the legislative veto used

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[52] INS v. Chadha, Docket No. 80-1832, Brief of the United States Senate, Appellee-Petitioner, p. 33.

[53] Nixon v. Administrator of General Services, 433 U.S. 425 (1977). "[The] proper inquiry focuses on the extent to which [the act] prevents the Executive Branch from accomplishing its constitutionally assigned functions [and if it does] whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Nixon at 443.

here passes that test. "It augments, and in no manner infringes upon, executive power."[54] The Senate Legal Counsel leaves to the Counsel to the Clerk the constitutional arguments regarding separation of powers and delegation of authority doctrines generally. The Senate joins the House brief by its endorsement of it.

While the House Office of Counsel to the Clerk does not have statutory foundation, its intervention in Chadha was agreed to unanimously by House resolution.[55] In its brief, the House Counsel fleshed out Congress' interpretation of separation of powers doctrine. Congress argues that

> [The] Constitution does not say that the three great functions shall at all times be kept separate and independent of each other, or that the three functions can never be blended or mixed or delegated as among the three Branches. The notion of total separation of the powers 'central or essential' to the operation of the three great departments is an illogical and impractical formulation of the separation doctrine, not a constitutional command.[56]

Not only does Congress say it is not unconstitutional for there to be some "mixing and blending," it asserts there is a positive good in this. The concept of separation

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[54] See Senate Brief, p. 28.

[55] See Brief of the United States House of Representatives, Appellee-Petitioner, p. III of INS v. CHADHA.

[56] See Senate Brief, p. 22.

must be the modern one which is pragmatic and flexible.[57] In the Court's Chadha opinion, Justice White is chided for replacing efficiency for constitutionalism.[58] We can see Congress here constructing the argument that identifies the efficient or pragmatic and flexible with the constitutional. It is a call to an understanding that uses contemporary usage so that the document "lasts the ages."

The House brief offers its own vocabulary of constitutionalism. It moves from "separation of powers" language to that of a "blended form of government." And "[at] the core of this 'blended' form of government is the legislating body, the Congress of the United States."[59] Certainly, there remain separate tasks for the three branches but within those tasks, the Constitution has authorized Congress, through the Necessary and Proper Clause[60] "to blend and mix, in statutory form, the various powers of government, and to delegate some of its own legislative functions to Executive officers and agencies."[61] Ultimately, then, Congress is arguing that the separation of

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[57] See Senate Brief, p. 23.

[58] INS v. Chadha, 462 U.S. 919 (1983) at 944-45.

[59] See Senate Brief, p. 24.

[60] United States Constitution Article I, Sect. 8., Cl. 18. Congress shall have the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers...."

[61] See Senate Brief, p. 24.

powers concept must be understood not as dividing "the branches into watertight compartments" but rather "to permit that degree of intergovernmental cooperation considered `necessary and proper'" for effective government."[62] Efficiency is, Congress claims, a constitutional standard.

We can also see in Chadha Congress' interpretation of the Necessary and Proper Clause in regard to the delegation of authority. Here, Congress depends upon John Marshall's rule in McCulloch v. Maryland for its understanding of this clause[63] and concludes that the delegation of its authority is an "appropriate means" toward the legitimate end, in this case, of dealing with deportable aliens. "The short of it is that Congress may use its `necessary and proper' powers so as to delegate to others some, all or none of its plenary legislative power...[and] it may place conditions and limitations on any such delegation...."[64]

Having delegated the power, what happens to it? That is, has Congress "given it away" such that what was originally legislative power is now executive power? If this is the case, then the legislative veto clearly has separation of powers problems. Congress cannot intervene in the executive's exercise of its own powers. This according

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[62] See Senate Brief, p. 27.

[63] See Senate Brief, p. 36.

[64] See Senate Brief, p. 36.

to Congress is not, however, what happens when congressional authority is delegated. Congress holds that

> It necessarily follows that when legislative power of this nature has been delegated to another department or executive officer, the power exercised by the delegatee retains its legislative or quasi-legislative nature. One who receives some part of the legislative power through the sweep of the Necessary and Proper Clause does not exercise that power by virtue of the Executive power to execute the laws of the United States. One exercises quasi-legislative power.[65]

On Congress' reading of the delegation authority, therefore, the power being exercised, by whatever department or agent, remains a legislative power and therefore Congress is clearly within its power not only to attach strings but to pull them as well.

In its briefs, Congress has articulated its own interpretation of two fundamental constitutional doctrines -- separation of powers and delegation of authority. While the briefs, of course, call on past Court opinions, what is of primary significance is that they also construct their own theories. Their arguments are based on Congress's theories of constitutionalism. Congress is arguing here that constitutional principles be defined in today's terms. While not repudiating original intent theory, Congress would qualify it as not apt in those situations that the Framers could not have conceived. For instance, the situation of a huge administrative state apparatus that requires power to

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[65] See Senate Brief, p. 37.

run but brakes on that power as well. Congress does not argue simple expediency. It ties its argument to the constitutional text and its history. It interprets the Constitution and bases its actions on that interpretation. As far as Congress is concerned, the legislative veto is not simply efficient, it is constitutional. Constitutional in some measure, however, because it is efficient. This would be part of Congress' constitutional standard.

Looking at the example of Bowsher v. Synar, one could argue that Congress sees itself as subservient to the Court on the Constitution. Chadha, however, is support for Congress' claim of full competence to read the Constitution for itself. Here, Congress has articulated its own interpretation. Even though the Court has not embraced this interpretation, Congress has continued to use legislative vetoes.[66] Does this mean Congress has the final say? Or, does this just mean the dialogue is ongoing?

Another example of Congressional constitutional dialogue with the Supreme Court comes in Morrison v. Olsen, the independent counsel case. At issue in this case is whether Congress can require that independent counsels be appointed by the courts when the Attorney General determines their need. The mechanism for this appointment comes in the Ethics in Government Act of 1978 which establishes the

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[66] See Louis Fisher, "Constitutional Interpretation by Members of Congress," p. 740.

office and duties of the independent counsels. It is the constitutionality of this act that is challenged. Congress is not a party in this case and therefore filed amici curiae briefs. These briefs reveal Congress' interpretation of the Faithful Execution and Appointments Clauses.[67]

In the brief submitted by the House, Counsel notes that this act has been re-authorized twice and signed into law three times by the President. This triple endorsement, according to Congress, comes from "Congress' careful consideration of the constitutional issues."[68] Congress wants the Court to know that it does not just hope the act is constitutional, it believes it is. "Based on overwhelming evidence of both constitutional legitimacy and suitability of the means to the legislative purpose, Congress passed the Ethics Act in 1978."[69]

Congress' constitutional arguments, here, therefore, are neither tentative nor elaborate. Can Congress vest appointment power in courts of law? Clearly, yes. The

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[67] Article II, Sect. 1, Cl. 8. "Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: -- 'I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States....'" Article II, Sect. 2, Cl. 2. "...Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[68] Morrison v. Olson, Docket No. 87-1279, Brief of the Speaker and Leadership Group of the House of Representatives, amici curiae at 12.

[69] See Brief of the Speaker and Leadership Group of the House of Representatives, p. 12.

Constitution says, "...the Congress may by Law vest the Appointment of such inferior officers, as they think proper...in the Courts of Law...."[70] Should this phrasing be read as to be limiting in Congress' authority? Certainly not. "It strains credulity to suggest that the Framers would have chosen that phrase if they meant the Clause to place unstated limits on what types of appointment could be vested [in this alternative]."[71]

In addition to reading the text of the document, the Senate in its brief returns to the Framers' debates to underscore Congress' reading of the Appointments Clause. Congress would remind the Court that extensive debate took place regarding the power of appointment. The extension of the power of appointment to the courts through the legislature was a deliberate act that was intended not just to promote "beneficial appointments" but also to preserve the balance in government."[72] This obviously comports well with Congress' view of the separation of powers doctrine discussed earlier. The act looks to the Attorney General to call for the independent counsel and then looks to the courts to appoint one who is independent of the branch she will investigate.

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[70] See Brief of the Speaker and Leadership Group of the House of Representatives, p. 12.

[71] See Brief of the Speaker and Leadership Group of the House of Representatives, p. 12.

[72] See Senate Brief, p. 25.

How independent the counsel is to be raised a further constitutional question that elicited Congress' reading of the Faithful Execution Clause. The challengers of the act claimed that unless the President has full authority over all in his chain of command, he cannot faithfully execute his duties. This assertion, says Congress, is based on a misreading of the Faithful Execution Clause as an expansion rather than a limitation on executive power. "By its wording and history, the Faithful Execution Clause exists primarily to limit Executive power, and not as a basis for the Executive to have laws struck down."[73] Even so, Congress is sensitive to the principle that no act of Congress can infringe on the executive's ability to accomplish its assigned functions. Therefore, vesting removal power for good cause in the Attorney General respects this principle. "Vesting solely that power of selection in the courts in order to guarantee impartiality and ensure public confidence in no way 'prevents the Executive Branch from accomplishing its constitutionally assigned functions.'"[74] Whether or not the Ethics in Government Act is constitutional is no longer a debatable issue as far as the Court and Congress are concerned. Both agree that it is.

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[73] Morrison v. Olson, Docket No. 87-1279, Brief of the United States Senate as amicus curiae at 36.

[74] See Brief of the United States Senate as amicus curiae, p. 46. Footnote omitted.

In both Chadha and Morrison, Congress calls upon its own reading of the Constitution to defend the constitutionality of its acts. In Chadha, in spite of the Courts disagreement, Congress continues to believe legislative vetoes are constitutional and continues to act on that belief. In Bowsher v. Synar, rather than calling on the text of the Constitution, Congress' briefs are based solely on appeals to Supreme Court precedent. Congress offers no independent constitutional theories here. The balanced budget statute, itself, was also different from the other two discussed here. Within the statute was the provision that its constitutionality could be immediately tested in court and that the Supreme Court could not decline to take the appeal.[75]

Bowsher and Chadha give mixed signals about Congress' deference to the Court as the ultimate authority on the Constitution. I turn now to that issue in the conclusion of this chapter.

Conclusion

This chapter argues that Congress can and does interpret the Constitution for itself. The new articulators of that interpretation are Congress' constitutional law offices, the Offices of the Senate Legal Counsel and Counsel

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[75] Congressional Quarterly, Inc., February 8, 1986, p. 216.

to the Clerk. Congress established these offices to protect its institutional interests before the Supreme Court but they serve a broader purpose as well. They provide the one voice of Congress on constitutional interpretation that Abner Mikva, among others, claims it does not have. Mikva says Congress cannot interpret the Constitution because its structure and political interests do not allow this. These offices, however, do gather the constitutional thoughts of the Congress and bring them together in one articulate whole.

This is not to say that Congress is participating in interpretation for the first time when the offices do this, however. Far from it. From the beginning, Congress has interpreted the Constitution in the performance of its work. Every act of Congress must be seen as an instance of Constitutional interpretation. What these offices provide through their briefs that is new is the record of Congress' constitutional reasoning. The briefs are the result of the ongoing process of constitutional interpretation by Congress that has been mistakenly discounted in the past.

The briefs of the law offices are the voice of Congress. Just as we can take an opinion of the Supreme Court and say, this is the Court speaking on the Constitution, we can take the briefs of the Senate Legal Counsel and the Counsel to the Clerk and say this is Congress speaking on the Constitution. Before, it was

debatable which constitutional theory offered on the floor of Congress was the constitutional theory behind the legislation. Now Congress has a mechanism through which to make clear the constitutional theory that undergirds its legislation. Were Congress to resort to the use of court-curbing bills, instead, we would know that Congress had rejected the Court's reasoning but not what reasoning Congress would offer instead. Court-curbing bills, therefore, are a weapon against the Court, but not a positive contribution to constitutional interpretation. Congress does, however, make an important positive contribution through its constitutional law offices.

Walter Murphy recently characterized the debate between democracy and judicial review as "misguided."[76] He said it was misguided because it looks for a universal answer to who should be ultimate interpreter. Murphy suggests, instead, a "modified version of departmentalism." His departmentalism would

> [lower] the stakes by ascribing different areas of competence - areas whose borders shift over time. Thus, if widely accepted, this form of departmentalism would reduce, though not eliminate, conflict between the federal judiciary, on the one hand, and Congress and/or the presidency on the other. Moreover, by decreasing the scope of judicial authority to bind other branches of the federal government, it underlines the value,

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[76] See Walter Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter." The Review of Politics 48 (1986):401-23.

> even necessity, of reason in persuading other branches to accept any particular constitutional interpretation.[77]

This echoes Fisher's "constitutional dialogue" that calls on all branches to come to their own constitutional interpretations rather than simply to defer to the Court.

Congress does this. It is yet unpersuaded by the reasoning of the Court on the legislative veto, for example, and chooses not to defer to the judiciary there. Congress claims this as one of its "areas of competence," but it is apparently less sure of its own reasoning on the balanced budget act and is open to the reasoning of the Court there. On the other hand, Congress is most confident that it knows what the Constitution means in the Appointments Clause and confidently shares its thinking with the Court there. Fisher's model of constitutional interpretation as dialogue and Murphy's of a modified departmentalism help explain the role of Congress which has been institutionalized by the law firms. Congress, through its constitutional law offices, appears to have put these theories to work.

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[77] See Walter Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," p. 417.

CHAPTER 5.

TESTIMONY TO CONSTITUTIONAL FAITH: TESTIMONY BEFORE THE COMMITTEE ON GOVERNMENT AND ELECTIONS OF THE CONNECTICUT GENERAL ASSEMBLY

Connecticut is the "Constitution State." It claims to have written the first American charter of government -- The Fundamental Orders -- long before the colonies ever conceived of themselves as states. So precious was this charter to Connecticut colonists that they risked their lives to protect it from royal revocation. When King Charles II of England decided to revoke The Fundamental Orders, the most liberal charter of all the colonies, he sent his royal governor, Sir Edmund Andross, to retrieve the document. Sir Edmund was received with great ceremony by the citizens of Connecticut on the night of his arrival. Seated at a table, the charter was placed before him. Almost immediately, all the candles in the room were blown out. When they were re-lighted, the charter was no where to be found -- and continued to be hidden from the king ever after. People in Connecticut take constitutions very seriously.[1]

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[1] Per interview with staff reference librarian of the Connecticut Historical Society on April 26, 1990.

Introduction

When, in 1985, Connecticut was called upon to be the 33rd (or 34th and deciding) state to join the call for a Second Constitutional Convention, the Committee on Government Administration and Elections (GAE) of the General Assembly held hearings at three locations in the state to elicit the thoughts of its citizens. While hearings themselves are not unusual in Connecticut, multiple hearings on one issue, as well as holding hearings outside the capital of Hartford, are. The number and political mix of speakers on both sides were unusual as well. They ran the gamut from Thomas I. Emerson, Lines Professor of Constitutional Law Emeritus at Yale University to the state's senators to heads of interest groups to a naturalized citizen who, in broken English, expressed a strong personal sense of the Constitution. There were liberals and conservatives on both sides of the issue.[2]

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[2] Betty Tianti who is Secretary Treasurer of the state AFL-CIO said, "I would say when you get people, when you get organizations such as the Business Roundtable and the AFL-CIO, former Defense Secretary Laird, Roy Ash, many conservatives who have joined with the liberal progressives, if you will, then I think we have a good position." See the Record of the Testimony Before the Government Administration and Elections Committee, The Joint Standing Committee of the Connecticut General Assembly. March 18, 1985, p. 605. The following references to this testimony will be referred to as GAE Testimony, date and page only.

The call for a second constitutional convention grew out of a desire of some to amend the Constitution to require a balanced budget. Since the Senate had failed to propose this amendment, its supporters were left with the larger task of getting 34 states to agree to consider the idea in a constitutional convention. Consequently, the debate over a balanced budget amendment expanded to the larger issue of a convention with all the attendant uncertainty of whether amendments would be limited to balancing the budget. Anxiety over a second constitutional convention that might do as the first and throw out the operating rules of government lead most who testified in Connecticut to ignore the issue of balancing the budget and instead to fight the idea of reconsidering the Constitution.

The testimony against the convention call far outweighed that in favor of it. Both sides had well organized coalitions, however. Most of those in support spoke to the economics of a balanced budget amendment while those opposed concentrated on the Constitution itself. It is this latter testimony that reveals the intense visceral attachment to the document that speaker after speaker referred to as "sacred." A remarkable depth of feeling is captured in the testimony before the General Assembly committee. This testimony epitomizes what Sotirios Barber calls

"constitution mindedness" and what Louis Fisher and Walter Murphy call for as an essential part of the whole practice of Constitutional interpretation. It is the kind of political activity John Brigham points to as popular interpretive practice. The frequent use of the religious metaphor in the testimony also draws this activity into the orbit of Sanford Levinson who speaks of "constitutional faith."[3]

There is little evidence other than Fourth of July celebrations of popular American interest in and commitment to the Constitution. It is usually as taken for granted and ignored as it is cherished. Were one to try to measure the "constitution mindedness" or "constitutional faith" of the American people, as opposed to the courts with their written opinions, one would be hard pressed to locate the evidence. Perhaps, this is the reason political scientists have been remiss in documenting these politics and understanding them as constitutional interpretive practice. Consequently, this testimony before the committee of

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[3] See Sotirios Barber, On What the Constitution Means, (Baltimore and London: Johns Hopkins University Press, 1984); Louis Fisher, Constitutional dialogues, (Princeton, New Jersey: Princeton University Press, 1988); Walter Murphy, "Who shall Interpret? The Quest for the Ultimate Constitutional Interpreter," The Review of Politics 48 (1985):401-23; John Brigham, The Cult of the Court (Philadelphia: Temple University Press, 1987); Sanford Levinson, Constitutional Faith (Princeton, New Jersey: Princeton University Press, 1988).

the Connecticut General Assembly offers a rare opportunity to hear Americans, most of whom disclaim any special competence in interpretation, explain what they think the Constitution means.

Testimony, under oath or otherwise, provides a special documentation of what people believe. L.H. LaRue recently explored the testimony before the United States House Judiciary Committee considering the impeachment of Richard M. Nixon during the Watergate affair. He turned to this testimony as evidence of how we understand ourselves as a people. Politicians, reasons LaRue, are experts in knowing what can be said publicly and thus he looked at the House Judiciary Committee's testimony for judgments about who we are as a people. In the same way, the testimony in Connecticut also gives us insight into, in LaRue's words, "our character and our aspirations."[4] In a vein similar to LaRue's, I look at the text of the testimony before a committee of the Connecticut General Assembly to take account of popular political discourse surrounding the Constitution. This testimony, given in Connecticut but drawn from national leaders, gives us insight into popular attitudes toward the Constitution. While sometimes attitudes toward the law have little

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[4] See L.H. LaRue, Political Discourse: A Case Study of the Watergate Affair (Athens, Georgia: University of Georgia Press, 1988).

affect on how the law is handled by those in charge of it,[5] in this case, popular attitudes are determinative. The attitude of most of those testifying in Connecticut is "hands off the Constitution." This attitude prevailed. While this chapter is not concerned with the ramifications of that perspective, it certainly raises questions for democratic theorists.

The issue of a constitutional convention brought out more who have a deep "constitutional faith" than those who are committed to a specific economic theory. "Constitutional faith," a term coined by Sanford Levinson in his book of the same name, is, "wholehearted attachment to the Constitution as the center of one's (and ultimately the nation's) political life."[6] Levinson wonders who, when confronted with an opportunity to affirm a commitment to the Constitution actually takes the oath seriously. When we raise our hand in affirmation in order to get a passport, for example, are we thinking of the Constitution or of the new horizons to which the passport is the ticket?

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[5] See John Brigham, "Bad Attitudes: Survey Research, Civil Liberties and Constitutional Practice." Paper presented to panels on "Public Discourse and Law: the Role of the Citizen," Midwest Political Science Association, April 13-15, 1989; and "Legal Culture and Legal Claims," Law and Society Meetings, Madison, Wisconsin, June 8-11, 1989.

[6] See Sanford Levinson, Constitutional Faith, p. 4.

Implicitly, Levinson assumes the latter. Consequently, he encourages a constitutional "conversation" within the American polity that would take more seriously the implications of the oath as well as the document itself. Levinson would, no doubt, be encouraged by the number of people in Connecticut who already take that document very seriously. He might, however, be troubled by the obvious reluctance of those same people to "risk" a formal conversation on it. People in Connecticut came out on three occasions and at times stayed all day and far into the night to have the opportunity to give testimony on the call for a constitutional convention. They "feared." They "trembled." They came to "protect" the Constitution. The irony, however, is that they came to protect it from the people.

The testimony in Connecticut mirrors the tensions the written document produced at its birth. James Madison and Thomas Jefferson squared off on the issue of reverence for the Constitution as the ink was drying and came down on different sides. Madison, spurred by concerns for stability, urged a respect for the Constitution that would evince itself in a diffidence toward the document that eschewed change.[7] Jefferson would love the document by having each generation make

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[7] See Federalist 49.

it peculiarly its own. He would love the process of constitutionalism over its product.[8] Those who prevailed in Connecticut were squarely behind Madison.

Yet, the Constitution, itself, does not require an unreflective veneration. While in the hierarchy of constitutional authority in popular culture, the people are, paradoxically, on the bottom, the people have the final say on the document. As political scientists, we should be attentive to how they think and talk about it. The deference paid to the courts in the area of constitutional interpretation has discouraged the "non-expert" from voicing her own views. The testimony before the Connecticut General Assembly committee, therefore, offers a rare opportunity to hear people speak on the Constitution and have their views recorded.

While these hearings were held in Connecticut, they represent more than the parochial concerns of that state. By the time Connecticut brought up the proposal of a convention for consideration, 32 out of a necessary 34 states had voted to call the convention. Connecticut and Michigan considered the proposal at the same time with either one possibly being the deciding state. Consequently, there were national forces

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[8] See Sanford Levinson, Constitutional Faith, p. 11.

organized for and against the call which came to Connecticut to testify. The chief proponent was the National Taxpayers Union. The chief opponent was a coalition of well established groups[9] called the "Committee to Save the Constitution." There were also a number of individual national organizations which sent representatives to Connecticut to speak for and against the call for a convention. The testimony from out of state speakers included that from such figures as Fay Wattleton, President of Planned Parenthood of America who spoke in opposition as did Judy Goldsmith, then-President of the National Organization for Women and Pierre duPont, former governor of Maryland and future presidential candidate who spoke in support of the convention.

The speakers were not representative of the American public at large. While the record shows several dozen names of "average citizens" who did not wait until after one o'clock in the morning to testify, on the whole, those who spoke did so for themselves as well as for some group. What we heard in Connecticut was the polished voice of the well organized interest

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[9] Most prominent among these groups were Common Cause, the National Organization for Women, Planned Parenthood, and the American Civil Liberties Union.

group.[10] The speakers display a striking constitutional consciousness. What is most striking about this constitutional consciousness is that it is consistently expressed in the language of religious faith. This language reflects a deep concern for the Constitution that evinces itself in an attitude of reverence and protective respect toward the document -- what Madison called a "wonderful veneration" leading toward stability and Jefferson called "sanctimonious reverence" leading toward ossification.[11] This urge to protect, however, inhibits constitutional debate and, in the extreme, paradoxically, makes the Constitution an impediment to the democracy it defines. For many of the speakers, a transposition has taken place making the Constitution -- the document as it is -- not a product of democracy but rather the democracy itself. Just as "democracy" as an issue is settled, not open to discussion, this transposition has removed the Constitution from genuine debate.

Genuine discussion is what Louis Fisher calls for in Constitutional Dialogues.[12] He argues that more

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[10] Interestingly, this voice often spoke derisively of interest groups. Apparently, in this area, it does not take one to know one.

[11] See Sanford Levinson, Constitutional Faith pp.9-10.

[12] See generally Louis Fisher, Constitutional Dialogues.

than the Supreme Court should form, air, and act on interpretations of the Constitution. He, like Walter Murphy, envisions a sharing of ultimate authority by the three branches depending upon the context. Fisher has gone beyond the hypothetical, however, to show that this sharing of ultimate interpretive power is, in fact, the way the American constitutional system actually works. Fisher's insight and evidence threaten the myths surrounding what John Brigham calls the "cult of the court." The image of a singular hold on the document by the Court weakens under Fisher's examination. This, according to Brigham, is all to the good. He argues that

> ...the Constitution and the Bill of Rights have become fundamental to modern political life and appreciated as characteristics of a "civilized humanism." The promise of constitutional interpretation is that it attempts to keep this humanism alive. Constitutional interpretation dominated by the Supreme Court truncates that promise.[13]

While Fisher is concerned chiefly with calling upon all three branches to be constitutional interpreters, he, like Brigham, claims the role for the people as well. Sotirios Barber, even more direct in his appeal for popular "constitution mindedness," argues that

> At some point the nation has to see and aspire to its better self. Courts can help

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[13] See John Brigham, The Cult of the Court, p. 232. Footnote omitted.

> lead, but they cannot really command obedience to the Constitution because it is impossible fully to understand conformity to the Constitution as a thing commanded.... [A] court cannot simply tell us the meaning of this Constitution; we have to see it for ourselves. Courts cannot achieve a Constitutional state of affairs on their own.[14]

Article V of the Constitution invites the people to come together in a constitutional convention to have a dialogue or, in Sanford Levinson's words, a conversation on the Constitution. The majority of those testifying in Connecticut, however, would forgo that opportunity. Not out of apathy certainly but rather because of a sense that the Constitution has a sacredness about it that closes it off from public debate. It, like a religious text, is to be known but not rewritten. It, like a religious text, has been handed down to us; written by others of a higher order who have never again been among us.

There is an interesting dichotomy between those who favor a convention and those who oppose it. Those who favor a convention do not treat the text as sacred. Those who oppose it do. Thomas Emerson, who opposes a convention call, is typical in his approach saying that

> I am testifying here today on behalf of the Connecticut Civil Liberties Union. The Connecticut Civil Liberties Union has not taken a position on the merits of a balanced

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[14] See Sotirios Barber, On What the Constitution Means, p. 213.

> budget. We are concerned very seriously, however, with the procedure involved in an amendment to balance the budget through the process of a constitutional convention.[15]

On the other side, the fear is instead about larger deficits. Scott Palmer, Executive Director of the Taxpayers Foundation was worried about the growing deficit rather than the Constitution. He argued that

> Historical records show that...civilizations go through various stages and one of the stages they go through right before they fall is when their institutions are captured by special interest (sic) and by bureaucracy and cease to serve the people who created them. The Balanced Budget Amendment...is our chance to arrest and reverse that process....It's our chance to pull ourselves out of the fire and keep on going as a free country.[16]

The proponents of the convention discuss the issue essentially in the context of economic necessity. When they discuss the Constitution specifically, they do so to point out the "safeguards" that would keep the convention from "running away." Throughout their testimony, they are on the defensive and ultimately fail to prove their case to the committee. Consequently, the proposal for a second constitutional convention was killed in committee and never debated by the full Connecticut General Assembly. The reason for their defeat is of little interest here but most probably due to the nature of the by-partisan coalition

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[15] See GAE Testimony, 3/18/85, p. 506.

[16] See GAE Testimony, 3/28/85. p. 569.

put together by the opponents. Both labor and business organizations joined with feminist groups like NOW and the National Abortion Rights League and anti-feminists groups like the Eagle Forum to oppose the convention call. In addition, the leadership of the proponents reportedly overplayed its hand and alienated some of its potential supporters.[17] Consequently, on the level of popular politics, this drama was a predictable one. On the level of constitutional politics, however, it offers an unusual opportunity for us to hear the Constitution seriously discussed by other than judges. This is what is of interest here.

The opponents to the call for a convention set the tone and formulated the language of the discussion. They cast the testimony in the mold of religious faith. What is remarkable about this testimony is both what is said and who is saying it. These espousers of traditionally conservative arguments are most often leading liberals.

Taking the Constitution Seriously

The Joint Standing Committee on Government Administration and Elections of the Connecticut General

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[17] See "GOP Says Bush Lost, Dole Won in Amendment Fight." The Hartford Courant May 5 (1985):D1.

Assembly opened its hearings at 11 a.m. on March 18, 1985 in the Senate Chambers of the Capitol in Hartford. Then-Connecticut Senator Lowell P. Weicker was the first to testify which he did by telephone from Washington. He set the tone of urgency and fear when he said "that it is nothing less than the Constitution of the United States that is at stake here."[18] While reluctant to breech the separation of federal/state authority, Connecticut's then-junior senator, Christopher Dodd, nevertheless also felt called upon to lend his voice to the opposition, reasoning that "...because of the nature of the issue, obviously the decision on whether or not to hold a constitutional convention...is a matter which involves the Federal Constitution, and therefore I think [it] highly appropriate to have members from the Federal legislature in this state to appear before you and to express their views."[19]

Like Weicker, Dodd feared for the result of a second constitutional convention and, calling the Constitution "our most fundamental document," said "Thus, by whatever accident of history [you have] the power to decide whether this issue is of such significance that we must put our very United States

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[18] See GAE Testimony, 3/28/85, p. 436.

[19] See GAE Testimony, 3/28/85, p. 530.

Constitution at risk. The stakes are beyond calculation."[20] Later in his testimony, Dodd referred to his "great reverence" for the Constitution which was written by "remarkable individuals" who "really did have a vision."[21] Extending the religious metaphor, Dodd concluded his testimony with by saying that

> The foundation stones of the world's most successful experiment in democracy will be at stake. The crisis will be one. No one can predict the outcome. If we go astray, how will we answer to history?...The choice is yours. If you chose to reject this resolution, you will enjoy, I believe, the blessing of history.[22]

While Dodd speaks in the hyperbole of the politician, he is not alone in the use of this language. Lawrence Tribe of the Harvard Law School is frequently quoted by various speakers as having said a constitutional convention would be "a perilous undertaking." Thomas Emerson said, "...a constitutional convention could destroy the whole system."[23] Samuel Rabinove, Legal Director of the American Jewish Committee, described his organization as a national one with 50,000 members which since its inception in 1906 "has been very concerned about the

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[20] See GAE Testimony, 3/18/85, p. 532.

[21] See GAE Testimony 3/18/85, p. 552.

[22] See GAE Testimony, 3/18/85, p. 540.

[23] See GAE Testimony 3/18/85, p. 513.

constitutional rights, freedoms and responsibility of all Americans."[24] He said his committee "believes that the calls for a constitutional convention are likely to do more harm than good,...our country may be moving into a major constitutional crisis which could do serious damage to the body politic."[25]

Scott Feigelstein, Director of the Connecticut Regional Office of the Anti-Defamation League of B'Nai B'Rith went further and said, "...The call for a constitutional convention does violence to the very democratic traditions and ideals which the league...have long fought to establish and maintain."[26] This sentiment was echoed by Joyce Kathan, Legislative Chair of the American Association of University Women who said that

> We firmly believe that the calling of a Constitutional Convention presents a very real danger to the integrity of the U.S. Constitution, which is renowned throughout the world for the protection it affords for the rights of individuals against the power of the state....Except for a declaration of war, a call for a Constitutional Convention is the single most important act our government could possibly undertake.[27]

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[24] See GAE Testimony 3/18/85, p. 554.

[25] See GAE Testimony 3/18/85, p. 555.

[26] See GAE Testimony 3/18/85, p. 587.

[27] See GAE Testimony 3/18/85, p. 713.

Speaker after speaker portrayed the call for a constitutional convention as an attack on the Constitution and especially on the Bill of Rights. The supreme irony, of course, is that it is the Constitution, itself, where we find the convention method for amending the document. While the framers of the Constitution structured the amending process in such a way as to make it difficult to amend the document, they did not make it impossible. Nor could they have and still have claimed to have a democracy. The "great experiment" of 1787 was to secure a government in the people's hands by enumerating its limits in a written constitution. Its innovation, beyond that of the separation of powers structure, was democracy, itself, in a large republic. The document was to guarantee the democracy, not replace it.

In the testimony is an unarticulated vision of what a constitutional convention would be. The opponents implicitly portrayed a convention as an assembly that would, on its own and without ratification by the rest of the country, change the Constitution in its own narrow interest. Those who would attend the convention were represented as minority extremists - the kind of extremist who is consistently defeated at the polls when they run for public office. The proponents unsuccessfully tried to

pierce this image. Louis Weber, a political scientist from Kentucky who testified in favor of the convention suggested an alternative view saying that

> Okay, so again once you pull the veil back from the convention, we're left with not some sort of a magical, mystical beast, but a distinguished gathering of successful and prominent citizens, carefully working out and trying to pass or defeat an amendment which they hope will be acceptable to ratifying legislatures or conventions in three-fourths of the states.[28]

Implicit, too, in the opponents' arguments was a picture of an apathetic uninvolved public which could be easily seduced or circumvented.

The if-it-ain't-broke-don't-fix-it theme persisted as well throughout the testimony. John Hardiman, a vice-president with Connecticut Common Cause, described himself as a "fanatic for the Bill of Rights" and commented that, "Our form of government is just right for us."[29] The biggest fear, however, was that there would be a "runaway convention." Here the worry was that a convention called to propose a balanced budget amendment would not be limited to that purpose and would instead consider amendments such as a "right to life" amendment, a line-item veto, a return to the gold standard or some other horrible that was frequently paraded before the committee. When a member of the GAE

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[28] See GAE Testimony 3/18/85, p. 592.

[29] See GAE Testimony 3/18/85, p. 718 and 719.

Committee suggested to Judy Goldsmith of NOW that this might be an opportunity to get the Equal Rights Amendment into the Constitution, she replied, "NOW is unwilling to risk the threat to our existent fundamental liberties posed by this call for a potentially volatile constitutional convention."[30] She, too, closed her remarks in a religious tone by quoting George Will who had written that

> It is alleged in Scripture that Shadrach, Meshach and Abednego passed through the burning fiery furnace with nary a hair singed. Perhaps the Constitution could pass through a convention similarly unscathed. But that would be a miracle. There are precedents for miracles, see again Scripture, but it is best to take auxiliary precautions.[31]

This was the chief concern of Thomas Emerson who, in his testimony argued that

> We think that the risks of a constitutional convention are definitely unacceptably high. The most important point of a constitutional convention is the question of whether it can be limited to a specific subject, or whether it can roam at will and deal with amendments to all parts of the Constitution, in effect, rewriting the Constitution. Constitutional experts are divided, right down the line on this question.[32]

This division of opinion on the constitutional questions involved in a convention was the source of

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[30] See GAE Testimony 3/18/85, p. 618.

[31] See GAE Testimony 3/18/85, p. 619-20.

[32] See GAE Testimony 3/18/85, p. 506.

further fear. Within the testimony is a constant chant of "too many unknowns." The proponents of the call tried to counter this concern with assurances of "safeguards;" the biggest one being that any convention proposal had to be ratified by the people. The people, however, were what the opponents feared. State Senator Lovegrove, a member of the GAE Committee, remarked on this fear saying that

> I'm one of the sponsors of this resolution. I've kind of made up my mind, but one thing that just dawned on me, that all the speakers who oppose this seem to have in common is that you don't trust the voters who are going to elect the delegates, to be responsible. You don't trust the delegates when chosen to represent the people of their district or state to be responsible. You don't trust the legislature, should an irresponsible amendment come from this convention to the legislatures to be adopted.[33]

Unlike Senator Lovegrove, State Representative Jonathan Pelto was anything but sanguine about the prospect of a convention. He, too, had a deep constitutional faith. He said that

> I'm speaking today on something that I feel is more important - I feel stronger about it than perhaps anything I've ever felt before in my life. The Constitution of the United States is our greatest and most sacred document. It is something that we can all look to as a guiding force in our democratic lives. It is the reason that I think many of us feel both comfortable and protected each and every day that we live. It is something that is so fundamental to our existence that that is the reason I rise to oppose a

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[33] See GAE Testimony 3/18/85, p. 558-559.

> constitutional amendment, and more importantly, a constitutional convention.
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> ...
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> I am not a constitutional lawyer. I am an American, and the reason I am here is because I believe that this will be the most important vote that any of us will ever have to take in our political careers. The prospect of a constitutional convention is terrifying.[34]

Ruth Tenza, member of District 1199 in the Northeast Health Care Employees Union and "a woman, and a mother and a registered nurse" testified that

> One of the speakers talked about fear, and that Franklin Roosevelt said we have nothing to fear but fear itself. I've walked on picket lines. I've organized in some tough organizing drives. I work as a psychiatric nurse. I've been mugged, assaulted, injured on the job, and I don't scare easily and when I came here this morning, I was very apprehensive about the prospect of a Constitutional Convention. After listening to more than eight hours of testimony, I am absolutely terrified at the prospect of a Constitutional Convention.[35]

She then described the Constitution as "the very fabric of our society."[36]

Trudy Morrow from North Branford and a naturalized citizen agreed. She said, "You've got a Constitution that's really like the rock bed. It isn't just the deed to my property....It is something that you can't

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[34] See GAE Testimony 3/18/85, p. 558-559.

[35] See GAE Testimony 3/18/85, p. 664.

[36] See GAE Testimony 3/18/85, p. 665.

even split like an atom....It is God."[37] The Constitution was depicted not as the document that defines our democracy but as the democracy itself. It is the "very fabric of our society." "It is God." It must be "preserved" at all costs -- even at the cost of democracy.

Professor of Law at Western New England College, Peter Adomeit, said, "A second Constitutional Convention would place that document in danger." and "You're about to make a political decision of high importance, and I urge you to protect the Constitution, and as Lincoln placed the preservation of the union above all else, so you should place preservation of the Constitution above all else, including even a balanced budget."[38] The religious metaphor in the testimony casts the "document" in the mold of the "sacred." As such, the document is handed down to the people by the framers and thus to be revered rather than revised. The document does not simply define and delimit a government. It constitutes a people; a people cannot be remade at will. The Constitution that must be preserved is the specific current document not a constitutional democracy per se. Martin Margolies who

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[37] See GAE Testimony 3/18/85, p. 678-79.

[38] See GAE Testimony 3/18/85, p. 684 and 685. Emphasis added.

is a highly valued and active member of the Connecticut Civil Liberties Union also merged the Constitution with the country when he spoke. He argued that

> ...the Constitution of the United States governs, I submit, not merely as a working instrument of rules but as a symbol, a symbol of almost religious significance....Each and every one of you have taken an oath of allegiance to the Constitution, and the reason you take an oath of allegiance to the Constitution is that the Constitution is the country....You take your oath of allegiance to that Constitution because the Constitution is the United States, and my God, you are risking losing both. It's not worth it.[39]

France is on its sixteenth constitution. It was France when it wrote its first document and it is still France after writing fifteen more. Not so for the United States according to these speakers. If the Constitution were to be rewritten, it would be the destruction of one nation and the birth of another. The United States is a nation of laws not of men. Originally, this was meant to connote a repudiation of the divine right of kings. It has come, for these speakers, to be taken literally. The nation is the Constitution, not the people who would "tamper" with the "sacred document." In this testimony, we see the Constitution become an impediment to the democracy it symbolizes.

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[39] See GAE Testimony 3/26/85, p. 1481-1482.

It is well known that Thomas Jefferson advocated that every generation have a constitutional convention. The United States has not taken Jefferson's advice believing that on the one hand it has been unnecessary and on the other that the descendants of the "founding fathers" were not up to the task. For the opponents of the call for a second constitutional convention, there is simply no one today of the calibre of the framers. Having already depicted the convention as a hotbed of extremist factions, it was an easy step to cast Jerry Falwell and Angela Davis in the role of "new framer" and find the specter ominous.

Ernest Newton, President of the Bridgeport City Council, found "frightening" the thought of who would be the new "founders." He was worried about "hidden agendas" and that blacks would not be fairly represented. "So I am totally against it," he said and then asked, "[Do] we have a new founding fathers...? [That question] is frightening to me."[40] The fact that it is slavery and not the rights of black Americans that the first founding fathers protected is lost on Mr. Newton. The years have faded that stain on the document. In the fervor of their worship of the original framers, the speakers become revisionist historians attributing the gloss put on the

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[40] See GAE Testimony 3/26/85, p. 1409.

Constitution by the mere mortals of the 20th century to the slave-holding demi-gods of the 18th.

Maintaining the vision of the framers is an important sub-text of the testimony. At times there is a sense that it is <u>their</u> document that we are only holding for safe keeping. At other times, however, the speakers articulate their own sense of what does and does not belong in the Constitution. Their opposition to the balanced budget amendment springs from their vision of what purpose the Constitution serves in their own estimation. Thomas Emerson spells this out in his testimony saying that

> The Constitution, by and large, is a document which spells out the structure of government and the rights of individuals, viz a viz government power. It does not spell out specific economic or social policies. The only occasion on which our Constitution was amended to deal with a social policy was a prohibition amendment, the 18th amendment, and that was repealed in the 21st amendment. It was a disaster. Those questions should be dealt with in accordance with our present constitutional structure. They should not be incorporated into the Constitution itself....[41]

Senator Dodd was also worried that "temporary problems" would find "a home in something that was not a temporary document."[42] State Representative Dudchik argued that a balanced budget amendment "would be a

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[41] See GAE Testimony 3/18/85, p. 510.

[42] See GAE Testimony 3/18/85, p. 552.

violation of the spirit and purpose of the United Stated Constitution. Fiscal policy has no place in fundamental law of the republic....Loading the Constitution with policy preference cheapens the document."[43]

The recurring thought was that the Constitution is a "fundamental law" not a list of policy preferences. This was not just the vision of the framers but of these speakers, themselves. There is a vacillation, then, between keeping the flame alive in the temple of the founding fathers and asserting their own sense of constitutionalism. Of course, their own sense is closely aligned with what they perceived to be that of the framers. Interestingly, not once did any of these speakers who had such a strong sense of what the framers wanted and what they, themselves, wanted in the Constitution did any of them suggest that they were the likely candidates to be delegates to a constitutional convention.[44]

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[43] See GAE Testimony 3/18/85, p. 615.

[44] In a conversation with the author on June 27, 1989, William Olds, Executive Director of the Connecticut Civil Liberties Union, said that should the convention be called, the CCLU would immediately work to get delegates compatible with the CCLU elected. He did not see the CCLU pursuing a strategy of fighting through litigation the legitimacy of some of the previous votes taken in other states.

The urge to preserve and protect goes beyond the words on the paper. The opponents were concerned about enforceability as well. If an amendment were unenforceable, it would undermine the overall authority of the document. The ghost of prohibition was raised by several besides Thomas Emerson above. A University of Connecticut political scientist said, "We've had one clear precedent of trying to enact a public policy by amending the Constitution, and that was the infamous prohibition amendment which took us decades to recover from...."[45]

The dialogue between the opponents and the proponents around the issue of enforceability brought out two visions of how the Constitution actually works. The picture we get from the proponents is that of a self-actualizing document. A minister who favored the call believed that, "the amendment drafted and approved would mandate some common sense."[46] Another said "Let me prove the point that words on the paper of the Constitution do solve problems...as long as the Supreme Court respects the Constitution and as long as we respect the Supreme Court, those words have meaning....[As] a matter of mechanism, the framers in

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[45] See GAE Testimony 3/16/85, p. 1431.

[46] See GAE Testimony 3/26/85, p. 1435.

Philadelphia gave you a way."[47] For these proponents, enforcement of the Constitution is an automatic "mechanical" process. Mr. Palmer of the Taxpayers Foundation testified that

> The Congress has tried honestly, I believe, to hold down spending. President Reagan has tried honestly and they simply cannot [stem] the tide of a system that rewards increased spending and punishes fiscal responsibility.[48]

Implicitly, then, when all else fails, put it in the Constitution and then the issue, removed from "politics," can be resolved.

Representative Dudchik with his usual passion, counters this thinking saying that

> ...despite the warnings of our founding fathers, proponents of this resolution to mandate federal balanced budgets have flocked to the Constitution as the Cowardly Lion to the Wizard of Oz, to plead for courage and discipline that they have been unable to force upon themselves....This resolution is the easy way out, a political quick fix. It's political cowardice at its worst. It is evasive, unworthy, and essentially a political exercise. I'll finish by saying, the oldest living Constitution in the world should not be dragged on stage to perform such charades.[49]

When it came to the issue of enforceability, the opponents change from reverent apostles of the faith to pragmatic politicians who look to the bottom line.

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[47] See GAE Testimony 3/18/85, p. 573 and p. 575.

[48] See GAE Testimony 3/18/85, p. 617.

[49] See GAE Testimony 3/28/85, p. 617.

There is only a brief digression to political realities, however. Generally, in spite of the fact that the speakers were with few exceptions seasoned politicians and lobbyists, there was little evidence in their testimony that they had ever witnessed politics at work. While they, themselves, were members of a traditionally moderate to conservative general assembly, they feared that the electorate who had sent them to Hartford as legislators would choose the head of the Communist Party or the Klu Klux Klan when it came to selecting delegates to a constitutional convention. These same politically savy people to whom the use of parliamentary maneuver had become second nature feared they would have to stand idly by as "extremists" steamrolled away the United States as they knew it.

Not everyone who testified in opposition believed that reverence for the Constitution meant leaving it as it is. Hugh McGill, Associate Dean for Academic Affairs at the University of Connecticut School of Law, testified that

> I happen to think that all constitutional law that passes through the rules that we know, rests upon an underlying political consensus and a bed or seed really, of constitutional politics and I am as exillerated (sic) as I am scared of what would happen if we took the lid of rules off and allowed the people directly to reconsider the basic

> possibilities upon which they wish their government to be framed and conducted.[50]

This spirit was shared by one of the political scientists who testified in favor of the call, Clyde McKee of Trinity College in Hartford, who asked

> Why are we so reluctant to use the procedures that we have had for nearly 200 years? Because we are fearful that we lack the courage, the wisdom and the talent to make them skillfully? What will happen if we do not practice using these constitutional procedures for another 200 years? We may become so politically impotent that we will be incapable to govern [sic] ourselves as a democratic nation.[51]

Conclusion

What we learn from the testimony in Connecticut is that the Constitution commands an extraordinary reverence; and, that this reverence has truncated genuine discussion of it. The recent calls from Louis Fisher and Sanford Levinson for dialogues and conversation and from John Brigham and Sotirios Barber for greater popular participation in giving meaning to the document fall on mostly deaf ears. Sanford Levinson's Constitutional Faith pointed out an ambivalence between "patriotism measured as commitment

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[50] See GAE Testimony 2/18/85, p. 575.

[51] See GAE Testimony 3/18/85, p. 577.

to constitutional ideals" and "a wariness about a too-eager willingness to celebrate one's own country, including the celebration of its constitution."[52] Levinson warns against a constitutional faith that is all celebration and which stops short of seeking new answers through deeper conversations. His hope is that the Constitution will provide the language for that conversation. If out of a misplaced reverence, however, we limit the use of this language to nine "high priests," the Constitution will fail us as that common tongue.

A political scientist had the last word on the subject of a second constitutional convention before the committee. In, perhaps fitting, juxtaposition to the first speaker who saw a constitutional convention as too great a risk, John Rourke offered a little-heard view saying that

> The delegates to the constitutional convention, ah, some were brilliant, some were mundane. Mr. Hamilton wanted to have a king. What I'm concerned about is democracy. What I support philosophically is the idea that we need to look at our system periodically. That we probably need to change our system or at least consider very seriously change to our system. That we ought to give as much democracy to the people as we can.[53]

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[52] See GAE Testimony 4/2/85, p. 1980.

[53] See GAE Testimony 4/1/85, p. 1980.

While the Constitution can be encased in plexiglass and enshrined beyond our touch in order to preserve it, democracy can not be encased in that way and really be preserved. Democracy requires an on-going self-analysis and all the risk that entails. This appeared unclear to many who testified in Connecticut. Only with reluctance could a few of the opponents justify a second constitutional convention for any reason and then only in the case of something like the Civil War or the Great Depression. There was an unarticulated sense that a second constitutional convention would somehow not be legitimate. Apparently, our otherwise perfect Constitution is flawed in Article V.

CHAPTER 6.

CONSTITUTIONAL POLITICS: INTERPRETIVE ACTIVITY IN AMERICA

Why study constitutional politics? I claimed at the beginning of this dissertation that the public law field has gone astray by limiting itself to the Constitution in the appellate courts, and especially the Supreme Court, when the full picture of American constitutional politics is more than this. A perspective limited to the Constitution-in-the-courts binds us to the concept of constitutionalism as a purely judicial activity. This leads us to think the Constitution can be handled only by legal professionals and then we fail to recognize its handling by others as constitutional politics. Professors, congressmen, lawyers and citizens of various sorts take the document into their own hands every day. When we ignore this activity we fail to understand how the Constitution functions in our society. In this dissertation, I have examined constitutional politics within four frameworks: non-instrumental constitutional politics, competition among theoretical views of constitutionalism, the elevation of the document above politics, and institutional life as a key to constitutional politics.

Non-Instrumental Constitutional Politics

Participation in constitutional politics is not always aimed at affecting specific policy outcomes. Constitutional politics as it is presented here is less instrumental than litigation before the courts. The aim is often to construct the conceptual terrain on which broad policy choices will be made. The steelworkers of Pennsylvania and Ohio wanted to take their fight against corporate disinvestment out of the courts where communitarian values have received less recognition to the community which has authority to construct a new constitutional claim developed from the eminent domain power. Using the eminent domain authority to stave off corporate disinvestment required the community's coming to a new understanding of the property interest that the Constitution protects. The community of displaced workers and movement lawyers' struggle to reshape its thinking on the Constitution and its promise is at the heart of constitutional politics.

The community property right movement does not look to the Supreme Court for affirmation of its claim or characterize policy problems in the simple "rights and remedies" fashion that Stuart Scheingold warned would undermine social transformation. The myth of

change through the acquisition of legally defined and protected individual rights is pierced in this struggle. Instead, the community focuses on replacing part of the present culture of individual competition and reward with a more communal social order using the tactics of grassroots democratic action to educate the public on the issues and build consensus around shared values. This is part of that process that Gerald Garvey calls determining society's syntax discussed in the introduction. Under this reading, the Constitution is understood not as a blueprint for a community but rather as a facilitator of social conversation on what constitutes the community. James Boyd White points to this activity of facilitation of conversation as necessary to the achievement of cultural change saying that

> To conceive of the law as a rhetorical and social system, a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the heart of law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another. The multiplicity of readings that the law permits is not its weakness but its strength, for it is this that makes room for different voices

> and gives a purchase by which culture may be modified in response to the demands of circumstance.[1]

The scholars who convened the Bicentennial Conference were also less interested in defining specific policy choices than in expanding the sources of constitutional meaning and thereby expanding the domain of American constitutional politics. They would define constitutionalism as rights consciousness and look to 19th century constitutional consciousness to recall the scope of the American constitutional tradition. That tradition includes the view that constitutional arguments are not furthered solely through litigation but in convention debates and through personal correspondence as well. It was incumbent upon 19th century citizens to form their own views on the Constitution and promulgate them. The Bicentennial scholars' work recalls and promotes this tradition thus broadening constitutional politics today.

Congress is an active participant in constitutional interpretation and thus expands constitutional politics beyond the door of the Supreme

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[1] See James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community. (Chicago: University of Chicago Press, 1984), p. 273. This depiction does not acknowledge the power the status quo has over law, however.

constitutional politics beyond the door of the Supreme Court. Here too, the activity often falls into general rather than specific policy areas. Congress is most concerned with having ascendance over that part of the Constitution dealing with its own powers. Louis Fisher makes the case that Congress defers to the Court generally but not in the area of separation of powers. Here Congress employs its law firms to argue its own interpretation before the Court forgoing the use of the solicitor general's office in order to stake out Congress' domain of interpretive practice.

In Connecticut, the specific policy debate over a balanced budget amendment gave way to broader concerns about appropriate arenas for constitutional discussions. The question there was whether or not constitutional debate should be broadened into the convention setting. This could open all aspects of the Constitution to revision as well as appoint a whole new set of official interpreters in the form of convention delegates offering the clearest opportunity to expand interpretive practice beyond the Supreme Court.

Competing Theories of Constitutionalism

Part of this interpretive practice focuses on the competition among theoretical views. Testing competing readings of the Constitution was the work of the

scholars attending the Bicentennial Conference at Amherst. There the competing views of constitutional interpretation were resurrected from history. Recalling the interpretations that did not win out in the struggle for meaning casts in sharper relief the views that did win out as well as the fact of multiple possibilities of interpretation. While popular rights consciousness has been pervasive in American politics, the vision of what the Constitution protects and promises has not always been the same. Recapturing alternative views from the past extends the present possibilities for the document. The hold that tradition has on the document is lessened when we see that the view that won out was not a monolithic one even in its own time.

The scholarly activity shared at the Bicentennial Conference is in the tradition of Herbert J. Storing who reminded us "what the anti-federalists were for."[2] Their rejection of the Constitution of 1787 was in light of an alternative plan not simply as obstruction. Those whose 19th century discourse on the document is recounted at the Conference were also not simply against something but rather offered viable alternatives. Keeping alive the recognition that the

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[2] See Herbert J. Storing, What the Anti-Federalists Were For (Chicago and London: University of Chicago Press, 1981).

document has always been open to competing interpretations is an important enterprise in itself.

The steelworkers put to the test the view that the Constitution is the people's document - available for their own direct interpretation even outside the amendment process. Establishing the concept of a community property right using a community's eminent domain power challenges traditional theories of constitutional interpretation. Here, the community is arguing that a court's interpretation is not necessary and, furthermore, neither is a constitutional amendment. When Judge Gibson argued for the people as final interpreter in Eakin v. Raub,[3] he posited the amending process as the mechanism of that interpretation. Community property rights activists believe their coordinate and equal authority over the document exists as direct interpreters without falling back on the amendment process. This, of course, is a radical challenge to contemporary constitutional interpretive theory which is dominated by variations of judicial review.

Congress challenges traditional judicial review theory as well. Harkening back to early republican arguments most strongly pressed by Thomas Jefferson, we can see Congress asserting its own variation on

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[3] 12 Sergeant & Rawle (S.C. Pa. 1825).

departmentalism.[4] Unlike Thomas Jefferson, however, Congress does not claim to have coordinate and equal authority in all areas of interpretation. Congress willingly defers to the Supreme Court in all those areas not pertaining to separation of powers questions. In that area, Congress feels fully competent and equal to the Supreme Court as an interpreter. While this, no doubt, raises questions in many minds, theorists like Walter Murphy and Louis Fisher endorse Congress' interpretive practices as both constitutional and feasible.

While these constitutional theorists argue among themselves, those in Connecticut argue with the Constitution. The framers believed that should Congress attempt to forestall a popular movement to amend the Constitution by refusing to propose an amendment, the people could nevertheless have their way by calling for a constitutional convention. The majority of the people testifying at the Connecticut hearings, however, argued for a constitutional theory

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[4] "The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It is more wisely made all the departments co-equal and co-sovereign with themselves." Letter to William Jarvis September 28, 1820, Paul L. Ford, ed., The Works of Thomas Jefferson (New York: Putnam's, 1905), XII, 161-164. In Walter F. Murphy et al., American Constitutional Interpretation (Mineola, New York: The Foundation Press, Inc., 1986).

that would remove the document as far as possible from amendment by the people. Under their reading of constitutionalism, democracy is attached to the existence of the document not to democratic practice. Article V of the Constitution opens the document to revision at the will of the people through a proposal from Congress or a convention. This is constitutionalism as process. Where the process is the convention method, however, supporters of democracy in Connecticut fall away.

Elevating the Constitution Above Politics

Those who testified in Connecticut on the call for a second constitutional convention appeared to be blinded by their commitment to the "document of the framers" and thus lost sight of the fact that there has always been competition over how the Constitution should be understood and that competition is healthy. Those who opposed a second constitutional convention did so because they viewed the Constitution as a blueprint no longer subject to revision. This is a vision of a constitution that functions as an end to debate rather than a facilitator of it. The tenor of the Connecticut testimony was one of fear and apprehension about opening the document to revision or reinterpretation. Here the Constitution is a list of settled claims and consequently to reopen discussion is

reinterpretation. Here the Constitution is a list of settled claims and consequently to reopen discussion is to deny where agreement has been found. Therefore the politics center on keeping the debate closed even though part of the enterprise of constitutional interpretation includes not only reinterpretation but reaffirmation of settled concepts. This requires ongoing open debate as well.[5]

The scholars of the Bicentennial Conference willingly participate in a ongoing open discourse but they too attempt to elevate the Constitution to a status above politics. This becomes clearest when Mark Tushnet's essay is juxtaposed with the others. For Tushnet, the Constitution does not hold special meaning or at least does not provide special protections unavailable from the political process. For the others, it does. Rights are essentially rooted in the Constitution and above the play of politics. While there can be some debate and disagreement, the Constitution keeps everything from being up for grabs. Tushnet argues that everything is always up for grabs and thus there must be constant vigilance based on

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[5] In Connecticut, the opponents to a second convention succeeded. What remains to be studied are the debates in the other states where the question was raised and answered affirmatively to hold another convention.

political action. The Constitution, according to Tushnet, doesn't secure rights but rather obscures the need for political action.

At the end of a pursuit through traditional business, political, and legal practices, the steelworkers jobs were still up for grabs and thus these workers turned to the Constitution to raise the ante in the fight for job security. What no one and nothing else could do to save jobs, the Constitution was called upon to do as job security was re-conceived as a constitutional community property right. Here the Constitution is a shield from socioeconomic forces rather than a mechanism through which politics is played out.

Congress would have us understand that their interest in constitutional interpretation is not self interested but rather for the purpose of remaining true to the document. The document demands a standard and adherence to certain principles that removes some activity from the realm of pure politics. When Congress protects its institutional powers under the separation of powers clause then, it does so, in its view, in order to remain true to the framers' vision and the requirements of constitutional government. Left free to its own devices, Congress might act

otherwise, it implies, but being bound to the document, it is bound to its higher orders.

Institutional Life as a Key to Constitutional Politics

Congress is the strongest competitor for the role of constitutional interpreter with the Supreme Court. Every time Congress writes a law it is participating in constitutional interpretation. Even here, however, Congress' view is popularly placed second to that of the Court as tentative, needing Court endorsement. This is not Congress' view of its role, however. We can see this most clearly in its response to the Chadha decision.

Congress' instituting its own law offices has given it an institutional mechanism through which to formally interpret the document and press that interpretation forward. This activity not only furthers what Sotirios Barber calls "constitution mindedness," it cements the principle of separation of powers - the fundament of our constitutional system. Consequently, fears voiced around the "problem" of having multiple interpreters are misplaced because this is not only within the bounds of American political/constitutional theory, it is the way our constitutional system has always worked. Louis

Fisher's research in this area has produced compelling evidence of this fact. Fisher shows Congress as the Court's constitutional colleague working with the Court not against it.

The executive, too, commonly offers its own constitutional interpretations. More research is needed here to fully understand the way all three branches handle the document. When the executive began in the 1920's to refuse automatically to defend, through the solicitor general, acts of Congress, it was asserting itself as the third constitutional colleague. This change in the practice of the executive's always defending acts of congress through the office of solicitor general eventually brought about the institution of Congress' Constitutional law offices so that it would have its own advocate before the Court. This is fertile ground for further research on separation of powers and the constitutional interpretive practices of the three branches.

Institutional life is a key to constitutional politics and the case of Congress makes this point but others do as well. The scholars at the Bicentennial Conference are from the elite law schools from which future constitutional lawyers, judges, and justices come. Their vision of the Constitution and their own role in constitutional interpretive practice determines

in large measure that of their institutions. These teachers are significant to constitutional politics because of their institutional affiliations. Part of their politics is the influencing of not only their students, but their institutions. These institutions are essentially attached to the profession of law which, in turn, is essentially attached to popular perceptions of American constitutionalism.

Fundamental to the legitimation of the concept of a constitutional community property right was first the endorsement of the idea by religious institutions and then later by governmental ones. Without these institutions lending their authority to the concept, it would have remained a radical idea outside mainstream politics. One of the most interesting aspects of the steelworkers' case is the phenomenon of these institutions embracing the concept.

Looking at the role state legislatures play is another institutional key to constitutional politics. Whether or not there would be a second constitutional convention was determined by a handful of legislators. In Connecticut, institutional rules enabled the opponents to the convention call to defeat the proposal in committee where the fewest opposition votes were

necessary. This is in striking contrast to the practice of a popular referendum for which proponents argued unsuccessfully.

The Constitution is attentive to various institutions, checking and balancing powers among them all. While the framers wanted the people to be able to circumvent Congress to amend the Constitution, they nevertheless did not put that power in the peoples' hands directly but rather placed it in the institutions of the state legislatures. This keeps the question of whether or not to call for a constitutional convention a public responsibility instead of an individual preference. The testimony before the committee confirms this as when it frequently refers to the power and responsibility that the committee holds. It is as members of a committee that they are to decide on the convention call. Consequently, the arguments used for and against appeal not to individual citizens but to institutional actors.

Conclusion

The significance of the politics examined in this thesis rests as much in the fact of these politics as in its content. We do not have a new dominant vision of constitutional property thanks to the steelworkers.

They have, however, planted a seed that may in time bear further fruit. For now, their most important contribution is in encouraging other than legal professionals to take the document into their own hands. The Bicentennial Conference scholars' task was, perhaps, easier. Their goal was to further the use of the language of rights in discourse on the Constitution. This is well within the American constitutional tradition. They, too, however, were seeking to open up new ground for debate. In recalling nineteenth century discourse they, like the steelworkers, were hailing a more communitarian thrust in constitutional interpretation. While those testifying in Connecticut appeared to be obstructionists to interpretation rather than interpreters themselves, they were, in fact, also participating in constitutional interpretative practice. Their interpretation of the document and of constitutionalism is that it is a list of settled expectations - not a foundation for open debate. They see "constitution mindedness" as most appropriate for the Supreme Court. Their constitution is a judicial rather than a political document and thus best left in the hands of those trained in the law. Congress, on the other hand, does see the Constitution as a political document -- what better branch to handle it

than the peoples' branch? It is, after all, a question of handling it rather than monopolizing it. Congress does not claim it should have the final say on the Constitution. It does claim (through its actions) to have authority over interpretation in those areas where congressional interest and expertise come into the fore, however.

Congress, the steelworkers, the Bicentennial Scholars, and those testifying in Connecticut are all "constitution minded." Their attention to the document calls for our attention to them. This dissertation has exposed some of the constitutional interpretive practices taking place outside the Courts and it calls upon the public law field to take account of this political activity as constitutional interpretive practice. It has also taken on Martin Shapiro's essential task of the political scientist -- undertaking the "careful description of what one real person says to another real person, when, how, and why" and found that real people -- not just courts -- are talking to other real people about the Constitution. Ultimately, it is this conversation that, together with the views of the courts, forms the full picture of American constitutional politics. Society needs to build consensus on policy issues. Part of this process is carried on in the language and

syntax of the Constitution. While making the Supreme Court the Oracle at Delphi truncates that process, constitutional politics helps.

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